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IN THE

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL

Appellants

v.

UNITED STATES OF AMERICA, ET AL

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1962

No. _____

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL

Appellants

v.

UNITED STATES OF AMERICA, ET AL

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Atlantic Coast Line Railroad Company, et al, Appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the United States District Court for the Middle District of Georgia, entered on April 18, 1962.[1]

[1]Reference to the page number of the record in the proceeding before the Commission will be preceded by "Tr.", to the brief of the Government before the lower Court by "G", to the brief of Southern before the lower Court by "S", to the brief of plaintiffs, appellants herein, before the lower Court by "P", to the record before the Supreme Court by "R" and all will be parenthetically expressed.

OPINIONS BELOW

The opinions of the specially constituted District Court of Three Judges are reported at 167 F. Supp. 747 and —F. Supp. —. The reports of the Interstate Commerce Commission are found at 300 I.C.C. 125 and 313 I.C.C. 752. The opinions of the District Court are set forth in the appendix attached to this statement as Appendix A and B, respectively. The reports of the Interstate Commerce Commission are reproduced in the appendices as Appendix C and D to this statement. The appendices are attached hereto as a separate volume.

BASIS OF JURISDICTION

I.

This cause of action was brought by Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Georgia Rail Road and Banking Company, operated as Georgia Railroad by its Lessees, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, in which certain shippers intervened as plaintiffs, under 28 U.S.C.A. 1366, 1398, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission.

The order of the Interstate Commerce Commission was entered under Sections 15(3) and 15(7) of the Interstate Commerce Act, 49 U.S.C.A. §§ 15(3) and 15(7), permitting the cancellation of joint rates via certain through routes for the transportation of coal from Kentucky, Tennessee and Alabama to certain points in Georgia and Florida, after a finding that the protesting parties had failed to show countervailing circumstances sufficient to overcome certain legal conclusions purportedly reached by the United States District Court in remanding the case to the Commission for further proceedings and a finding that said cancellation would not constitute a violation of Section 3(4) of the In-

terstate Commerce Act prohibiting discrimination between connecting carriers.

II.

The final judgment of the United States District Court for the Middle District of Georgia was entered on April 18, 1962. Notice of appeal was filed in said Court on May 15, 1962. By order entered May 18, 1962, the Clerk of the United States District Court for the Middle District of Georgia was ordered to transmit the original records in lieu of copying said records, to the United States Supreme Court. The time for docketing this appeal is July 14, 1962, under Rule 13 prescribed by the United States Supreme Court, and 28 U.S.C.A. § 2101 (a).

III.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C.A. § 1253 and 2101 (d), and is sustained by **United States v. Drum** (1962), 368 U. S. 370, 7 L.Ed. 2d 360.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C.A. preceding Sections 1, 301, 901 and 1001). as well as the principal provisions of the Interstate Commerce Act [49 U.S.C.A. §§ 1 (4), 1 (5), 3 (4), 15 (3) and 15 (7)] and Administrative Procedures Act [U.S.C.A. §§ 1006, 1007 and 1008] are set forth in Appendix E to this statement. Appellants also take the position that the action of the Commission and the District Court complained of constitutes a denial of due process of law in violation of the Fifth Amendment to the United States Constitution.

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Where a Statutory Three-Judge District Court vacates an order of the Interstate Commerce Commission and remands the case to the Commission for further proceedings, does the failure to appeal the District Court's decision render same the "law of the case"?

(2) Where the Interstate Commerce Commission enters an order continuing in full force and effect its prior order which had been vacated and set aside by a Federal Court, would such action be unlawful and the order in question invalid?

(3) Where an administrative agency has instituted an investigation into proposed changes published in railroad tariffs prior to the effective date of such publications, can any decision or opinion, which is interlocutory in nature and not final, eliminate or alter the issues properly raised by that investigation until a final determination of those issues even though the Commission did not exercise its power to suspend said publications under Section 15(7) of the Interstate Commerce Act, 49 U.S.C.A. § 15(7)?

(4) On appeal from the decision of the Interstate Commerce Commission, did the specially constituted Three-Judge District Court misconstrue its function and exceed its authority in attempting to rescue the Commission by making findings *de novo* which the Commission itself was unable or unwilling to make?

(5) Do the provisions of Section 3(4) of the Interstate Commerce Act, 49 U.S.C.A. § 3(4), effectively declare discrimination between connecting carriers to be unlawful in all its forms without qualification or limitation as to particular types of cases?

(6) In refusing to set aside and permanently enjoin the order of the Interstate Commerce Commission permitting the cancellation of joint rates via certain through routes that had been in existence and relied upon by the public for a half century prior to the publication of changes at issue herein, did the District Court merely give "lip service," thereby mis-

apprehending and grossly misapplying the standard for determining the substantiality of evidence as approved by this Court in *United States* v. *Pierce Auto Freight Lines* (1946), 327 U.S. 515, 90 L.Ed. 821?

STATEMENT OF THE CASE

This is an appeal from a final judgment of a specially constituted United States District Court of Three Judges which sustained the validity of an Interstate Commerce Commission order permitting the cancellation of railroad joint rates via certain through routes which had been in effect and utilized by the shipping public for more than a half century in connection with the movement of coal from Kentucky, Tennessee and Alabama to points in Georgia and Florida.

By tariff schedules to become effective January 6, 1956, the Southern Railway and its subsidiary, the Georgia, Southern & Florida Railway, sought to cancel joint rates via certain routes for the movement of coal originating on the Louisville & Nashville Railroad Company[2] in Kentucky, Tennessee and Alabama when destined to points located on the GS&F Railway Company south of Macon, Georgia, to and including Jacksonville and Newco, Florida. For many, many years there have been four routes in existence for the movement of this coal:

(1) L&N to Atlanta; Southern to Macon; GS&F to destination.

(2) L&N to Atlanta; Georgia Railroad to Macon; GS&F to destination.

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[2]Also included were origins on the Nashville, Chattanooga & St. Louis Railway, which is now a part of the Louisville & Nashville Railroad Company, hereinafter referred to as the L&N. The merger was effectuated after the initial record herein was made and the effect of that merger on this particular proceeding will be explained later.

(3) L&N to Atlanta; Central of Georgia Railway to Macon; GS&F to destination.

(4) L&N to Atlanta; Atlantic Coast Line to Cordele, Georgia; GS&F to destination.

Under Southern Railway's tariff schedules all of the above-mentioned routes would be eliminated in the competitive commercial sense except Route No. 1 due to the cancellation of joint rates on this particular traffic. However, such tariff schedules were suspended by order of the Commission on January 5, 1956, in Investigation and Suspension Docket No. 6538.

Upon consideration of the record, an Examiner's proposed report, exceptions and replies thereto, Division 2 entered its report and order on March 19, 1957, in *Routing, Coal From Origins on Louisville and N. R. Co.*, 300 I.C.C. 125. Therein, Division 2 held that with respect to I&S 6538:

> ". . . The bridge routes sought to be eliminated are not unduly circuitous, and the shipper testimony before us is in favor of continuing those routes. Considering our duties under the National Transportation Policy to maintain a transportation system adequate to meet the needs of commerce generally and of the national defense, we are not satisfied that the respondents have met the burden resting upon them of showing that the cancellation of the bridge routes proposed would be consistent with the public interest . . . **We find that the proposed cancellation of joint rates** and routes is not shown to be just and reasonable." (Emphasis supplied.)

Southern Railway filed a petition for reconsideration of the Commission's decision referred to above and the effective date of the order requiring cancellation of the involved schedules was stayed pending final disposition of the issues raised therein. However, the petition for reconsideration was denied by the Commission and a subsequent petition by Southern to stay the effective date of the modified order was

also denied. Thus, the schedules in the Investigation and Suspension Docket 6538 were cancelled on October 5, 1957.

Thereafter, on December 18, 1957, a complaint was filed by Southern in the United States District Court for the Middle District of Georgia, seeking to have the Commission's decision in this case set aside. Said complaint was predicated on the grounds that the Commission's action in this proceeding was arbitrary, capricious, an abuse of discretion, and not in accordance with the evidence presented or the law applicable thereto. It was, therefore, contended that such arbitrary action resulted in the issuance of an order that unlawfully deprived Southern of its long haul and of revenues from such transportation to which its was allegedly entitled.

Upon review, the Statutory Three-Judge District Court accurately described the nature of the proposal involved in *Southern Railway Company* v. *United States*, 167 F. Supp. 747, at page 750:

> "**Seeking to eliminate the joint rate** as existing for all routes except the direct route, No. (1), and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission schedules **proposing to eliminate the joint rates** . . ." Emphasis Supplied.)

In addition, the Court specifically stated the basis upon which its decision would rest at page 752:

> ". . . Our disposition of the case is based on the nature of the findings and conclusions of the Commission. . ."

The Court then quoted in full the three basic findings upon which the Commission had concluded that the proposed schedules were not shown to be just and reasonable, i.e., such cancellation would not be consistent with the public interest since (1) the routes in question are not unduly circuitous, (2) shipper testimony is in favor of continuing those routes, and, (3) the needs of commerce generally and of the

national defense require the maintenance of the status quo. Upon consideration thereof, the Court held that these basic findings, as well as the Commission's conclusion in connection therewith, would have been valid insofar as the Central of Georgia route was concerned, but "it is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it." Thus, the Court did not hold that the Commission's refusal to permit the cancellation of joint rates over long-established routes would constitute an arbitrary or unlawful deprivation of Southern's alleged right to its long haul and of revenues from such transportation as had been charged in the complaint.

As to the Atlantic Coast Line and Georgia Railroad route, the Court said that the Commission may well have considered the factors necessary to support its conclusions on the initial record but that, if it had, they were not reflected in the report and order under attack. The Commission alone may make such a determination between conflicting interests and the Court merely held that the limited findings which had been made by the Commission were not sufficient. This, for the reason that, in the absence of any consideration given to other pertinent factors, Southern Railway had established a so-called "prima facie" case on the grounds that the routes in question were unduly circuitous and, therefore, uneconomical. However, the Court hastened to say that wasteful operation in the economic sense is to be avoided only "if such elimination does not run counter to other mandates of the act."

The economic loss to which the Court referred is a geographical fact that has been in existence since the inception of these rates more than a half century ago and which is prevelant throughout the transportation industry i e some routes are longer than others. For example, as stated by the Court in *Southern Railway Company* v. *United States*, *supra*, at page 755:

"To the extent that the Commission's finding that the two longest routes 'are not unduly circuitous' is intended to mean that they are not undesirable from an economic standpoint, the record does not support a conclusion, and such a finding is clearly erroneous. As to the Central of Georgia route, we cannot say the same. The route is so little longer than that of the Southern that we cannot overrule the Commission's finding that as to that route the Southern failed to carry its burden of showing its elimination is consistent with the public interest."

Thus, as reflected in the Court's opinion, Southern Railway's so-called prima facie case was relagted to the showing that a part of one route is longer than a part of another route. In view of that fact, the Court concluded that the failure of the Commission to make findings of fact which could be considered as offsetting the longer distance via those routes:

". . . make it impossible for us to determine between conflicting interests, which determination it [the Commission] alone may make."

Among the considerations which the Court stated that the Commission might properly weigh to counteract the prima facie case made by Southern were:

(1) "The need for competing lines in this particular traffic;

(2) "The need for the interchanges between these carriers for continued efficient transportation of this traffic or in general;

(3) "The effect on such interchange and on the economic position of the other carriers of the elimination of these joint routes for coal;

(4) "The effect of such elimination on the carriers concerned in relation to their ability to furnish adequate service if and when needed for the national defense."

> "The difficulty we have in reviewing the Commission's order here is that **no basic findings are made as to any of these considerations.**" (167 F. Supp. 754. Emphasis Supplied.)

In view of the foregoing, the Court remanded the case to Commission for further proceedings not inconsistent with its opinion and in doing so, stated at page 755:

> "It is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it."

In the light of the foregoing, it was obviously the intention of the Court that the status quo should be maintained until a legally valid report and order had been issued by the Commission. Therefore, to the extent that Southern had established a prima facie case on the longer haulage via the routes in question and the extra interchanges shown in the initial record, it was incumbent upon the Commission to either review the prior record with a view of so shaping its report and order as to be in accordance with the opinion of the Court or permit such additional evidence as would be necessary to make basic findings sufficient to support the validity of an order properly and legally disposing of the issues raised therein. In fact, the Court said that the Commission could so shape its report and order as to permit the cancellation of joint rates via two of the routes but not the Central of Georgia route. However, this was neither a conclusion drawn by the Court nor a requirement placed upon the Commission as the Court specifically said "we do not even conclude that the Commission must do this." Especially so, since the further proceedings which the Court did order would necessarily be within the primary jurisdiction of the Commission.

In view of the fact that the initial record was then three years old and the fact that significant changes had occurred bearing on the issues involved, the Coast Line, L&N and Georgia Railroad filed a petition on December 11, 1958,

seeking to have I&S 6538 reopened for further hearing or, in the alternative, oral argument before the entire Commission. While these Appellants confidently believed, and so stated in their petition, that the initial record was sufficient to enable the Commission to make specific and adequate findings of fact to sustain its previous order in toto, they were of the opinion that the record should be supplemented with additional evidence concerning the factors which the Court said would be pertinent.

Upon consideration of said petition, as well as Southern Railway's reply thereto, the Commission entered its order on March 23, 1959, modifying its prior order in I&S 6538 requiring cancellation of joint rates via the Coast Line and Georgia Railroad routes and granting further hearing for the purpose of developing additional evidence to determine whether cancellation of such rates would be consistent with the public interest and otherwise lawful. Insofar as the Central of Georgia route was concerned, the Commission stated that its prior order (which had been set aside by a Federal Court) "continues in full force and effect."

Thereafter, in June of 1959, Southern Railway republished its tariff schedules[3] so as to show an increase in the rates on this traffic when the Coast Line and Georgia Railroad routes were used from and to the points here involved. This, for the reason that, as previously pointed out, the prior schedules had been effectively cancelled on October 5, 1957, prior to the initial Court case. However, such schedules were published on statutory notice and were subject to protest by interested parties. All carriers affected by those publications filed protests and, believing that, in all fairness to the parties, the status quo should be maintained until a valid order could be issued, requested that the publication be suspended. Al-

[3]Supplements 78 and 82 of Tariffs, I.C.C. Nos. 1427 and 1499 respectively (currently contained in S.F.T.B. Freight, Tariff 834-C, I.C.C. 5-62.)

though refusing to suspend and thereby causing the schedules to become effective as published on July 13, 1959, the Commission did state that there is reason to institute an investigation into the lawfulness thereof and ordered such investigation in I.C.C. Docket No. 33128 on July 10, 1959, pursuant to the provisions contained in Sect. 15(7) of the Interstate Commerce Act.

Thus, the two proceedings, I&S 6538 and ICC 33128, were thereafter heard on a consolidated record in Atlanta, Georgia, on November 30-December 1, 1959, before Examiner Albert E. Luttrell. At the request of the Examiner, protestants, appellants herein, agreed to present their evidence first at the further hearing with the understanding that their action in doing so did not constitute a voluntary assumption of any part of the statutory burden of proof which Southern was required to sustain in those proceedings. Therefore, evidence was presented by the protestants, appellants herein, relative to the rates, routes, distances, circuity, earnings, and operations via the restricted routes as against the retained routes to show that such restrictions were completely unwarranted. In fact, changed traffic and operating conditions (which had occurred since the initial record was made and reviewed by the Court) showing faster service via the Retained routes and elimination of interchanges were placed into the record on further hearing.

On the other hand, the evidence introduced by Southern merely shows gross capital expenditures, freight train operating averages and improvements on a systemwide basis in addition to improvements in operations over its Atlanta-Macon line without showing any deficiencies in the evidence presented by protestants, appellants herein. In fact, the initial reasons advanced by Southern Railway in support of its schedules remained unchanged during the course of the further proceedings. Southern's Freight Traffic Manager, Mr. S. R. Goodman, stated that the elimination of joint rates

via the routes in question was a part of an overall program and that (Tr. 13):

> "Under the routing provisions here involved, Southern Railway System has endeavored to eliminate intermediate railroads because inclusion of such railroads can only delay the traffic and increase the cost of operation. Interchange between railroads is expensive."

The record, however, is completely devoid of any evidence that shippers have ever complained of delay in moving the traffic via the restricted routes. In fact, shippers and receivers appeared in opposition of these schedules at each and every hearing before the Interstate Commerce Commission but none have ever appeared in support of such schedules. Moreover, Southern made no attempt to show the cost of operation over any segment of any line and was unable to show any increase in expenses incurred by it for interchanges when the traffic moved over the restricted routes.

Notwithstanding the undisputed evidence of record showing countervailing circumstances and changed transportation conditions, the Hearing Examiner seemed convinced that all issues had been predetermined by the Court and specifically stated at the outset in his recommended report dated June 10, 1960 at Sheet 2:

> "The Court **held** that Southern had sustained the burden of proving that elimination of these two bridge routes by the Georgia Railroad and the Coast Line **is consistent with the public interest and is justified;** that the shipper testimony amounted merely to expressions of desire and furnished no legal support for the Commission's conclusions; and that the facts as to distance and operation negative in law the finding of the Commission that the routes were not unduly circuitous. **There was no appeal from the Court's decision** . . ." (Emphasis supplied.)

Following a recitation of some of the contentions and issues raised by the parties, the Examiner concluded on Sheet 8 of his recommended report:

> ". . . In its opinion the Court held that elimination of the two bridge routes are in accord with the National Transportation Policy and the needs of national defense. **This holding has not been disproved by protestants** . . . no one showed that there was any need from the standpoint of national defense or otherwise for the two routes here involved.
>
> ". . . The evidence on further hearing fails to offset the holding of the Court that the proposed elimination of routes is consistent with the public interest and is fully justified."

Exceptions on behalf of protestants, appellants herein, to the Examiner's recommended report and order were filed December 12, 1960; and a reply thereto was filed by Southern Railway on January 3, 1961.

In its decision of May 19, 1961, as reported in *Routing, Coal From Origins on Louisville and N. R.*, 313 I.C.C. 752, the Commission, by its Division 2, specifically stated at page 747: "The question here, however, is whether cancellation of those routes **(in connection with the lowest joint rates)** is consistent with the public interest under Sect. 15 (3).

In holding that the schedules were justified, the Commission merely took excerpts from the recommended report and paraphrased other statements by the Examiner. Neither the Examiner, in his recommended report, nor the Commission, in its decision, made findings with respect to Section 1(4) and 1(5) issues although they were specifically raised by the parties as reflected in the record and in every pleading filed by protestants, appellants herein. In fact, the Examiner neglected to even mention either issue whereas Division 2 did at least mention the Section 1(4) issue but failed to make a finding with respect thereto.

Petition for reopening, reconsideration and oral argument on behalf of protestants, appellants herein, was filed June 26, 1961, and a reply thereto was filed by Southern Railway on July 18, 1961. Thereafter, the Commission entered its order dated September 13, 1961, and served on the parties September 29, 1961, summarily denying said petition for reconsideration.

Therefore, on November 14, 1961, a complaint was filed by these appellants in the United States District Court for the Middle District of Georgia seeking to have the Commission's further decision in this case set aside. Said complaint was predicated on the grounds that the Commission order complained of was based on errors of law, was neither supported by the evidence of record nor based upon adequate findings, and that its action *in permitting the cancellation of such rates* was arbitrary, capricious, and an abuse of discretion. It was, therefore, contended that such arbitrary action resulted in the issuance of an order that deprived these railroad plaintiffs of property without due process of law and will prevent the utilization of efficient and economical routes which the public has used for years, thereby causing a diminution of service affecting the movement of other commodities and resulting in irreparable damage to these appellants.

The Honorable Elbert P. Tuttle, Chief Judge of the Fifth Circuit, entered an order on November 28, 1961, designating Griffin B. Bell, United States Circuit Judge, the Honorable W. A. Bootle, United States District Judge for the Middle District of Georgia, and the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, as the Statutory Three-Judge District Court to hear and determine this cause of action. Various parties were thereafter allowed to intervene as additional plaintiffs[4]

[4]Parties allowed to intervene as additional plaintiffs: Harlan County Coal Operators Association, The Mead Corporation and Georgia Kraft Company, appellants herein.

or defendants[5] and a joint answer to the complaint was filed on behalf of the Government by the Interstate Commerce Commission January 13, 1962.

Following submission of briefs and a reply brief by plaintiffs, appellants herein, the case was argued before the specially constituted Three-Judge District Court, at Macon, Georgia, on March 28, 1962. In its review, the Court reiterated the fact that it had previously "set aside" the Commission's order of March 19, 1957, but now concludes that it was not prejudicial error and indeed lawful for the Commission to continue in full force and effect a part of said order without prior relief from the Federal Court which had set it aside. Such a retroactive but inconsistent conclusion was apparently predicated on the grounds that its previous comments in the initial review concerning the Central of Georgia route constituted *the law of the case* since the Court now says that by virtue of the Commission's action in continuing an administrative order which had been set aside by a Federal Court:

> "... Southern was not permitted to file schedules cancelling it (the joint rates applicable via the Central of Georgia route)" (Emphasis supplied).

In addition, the Court persistently referred to the cancellation of routes and the cancellation of through routes embracing Coast Line and the Georgia Railroad, thereby concluding by making a finding that:

> "The routes were closed and no question was left as to rates..."

Having enumerated the findings which it says the Commission made, the Court held that such findings were warranted in law and in fact when tested by Sections 15(3) and 15(7) of the Interstate Commerce Act. It was further

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[5]Parties allowed to intervene as additional defendants: Interstate Commerce Commission and Southern Railway System Lines.

held that findings with respect to Section 1(4) and 1(5) of the Act were neither made by the Commission nor necessary since "no question was left as to rates." As to the discrimination provisions of Section 3(4) of the Act, the Court said, "we are not here concerned with switching or terminal services" and "the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia." Therefore, the action to have annulled and set aside the Commission's order complained of was denied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In addition to seeking the correction of errors in fact and in law committed by the Court below, appellants are asking this Court to condemn a philosophy of judicial review based upon the application of a tectnique and a standard which are completely at variance with those previously established by the Supreme Court. The standard applied by the District Court in this case for determining the substantiality of the evidence, far from being sanctioned by *United States* v. *Pierce Auto Freight Lines* (1946), 327 U. S. 515, 90 L.Ed. 821, is indeed based upon a misapprehension and gross misapplication of the standard approved by this Court in that case. Moreover, mere recitation without application of such standards, as is the case here, has neither been sanctioned nor condoned by this Court and it should not do so now.

Merely stating briefly some of the more important errors made by the District Court shows how far it strayed from the standards which this Court has set up for reviewing orders of the Commission concerning rate changes under Section 15(3) and Section 15(7) of the Act.

a.

The District Court made a finding that "no question was left as to rates" thereby sweeping aside issues pertaining to

Sections 1(4) and 1(5) of the Act. That conception of the scope and function of the investigation proceeding by the Commission in I.C.C. Docket No. 33128 (erroneously referred to by the Court in its opinion as a suspension docket) is inimical to the very order initiating the proceeding as well as to Section 15(7) of the Act, by virtue of which said investigation order was issued. In fact, both the investigation order and Section 15(7), by their very terms, concern themselves with the **lawfulness** of the proposed rates which must conform to all provisions of the Act which set forth standards of lawfulness, including Sections 1 and 3. As the Court held in *United States* v. *Perko*, 133 F. Supp. 564, 570, "The people may change the law of the United States but the Court cannot do so."

That investigation was instituted prior to the effective date of Southern's republished tariff restrictions and the mere fact that the Commission did not exercise its power to suspend as it had previously done in I&S 6538 cannot change the issues properly raised therein. Both orders were issued pursuant to the provisions of Section 15(7) and the only distinction that can be drawn is that under the suspension order the rates could have become temporarily effective after a period of seven months subject to a final determination of the issues, whereas under the investigatory order the rates became temporarily effective immediately subject to a final determination of the issues raised therein.

Taking Warner Robins, Georgia, as a destination, it was shown in Exhibits 47 and 51 that from the Windrock base group the rate in effect via the Georgia Railroad route on July 12, 1959, was $4.61 per net ton, whereas today it is $4.95. Similarly, the rate to Warner Robins from the same group mines via the Coast Line route is considerably ($3.27) higher than the rate in effect via Southern Railway and Central of Georgia routes today (Exhibit Nos. 60 and 61). Like comparisons appear throughout Exhibits 47, 51, 60 and

61 showing that the higher combination rates over the through routes of Coast Line and Georgia Railroad are not in any way competitive as a result of Southern's restrictions.

Insofar as those restrictions are concerned, the Commission's investigation order of July 10, 1959, sets forth the specific **rate tariffs involved** including as to each "the reference mark bearing an increase symbol." Thus, the higher combination rates that became temporarily applicable on July 13, 1959, were subject to a final determination of the issues raised as to the justness, reasonableness and lawfulness of the changes brought about by Southern's action. As to those determinations, both the Commission and the Courts have held as stated in *Cancellation of Routing, Paper, Gainesville M.R. Co.*, 306 I.C.C. 515, 520:

> "An appropriate standard with which to measure the justness and reasonableness of the rates over the Gainesville Midland routes (here Coast Line and Georgia Railroad routes) is the level of comparable rates from and to the same points over the competitive routes (here Southern and Central of Georgia routes). See *Carolina, C & O Ry. Co.* v. *Southern Railway Co.*, 299 I.C.C. 335; sustained *Southern Ry. Co.* v. *United States*, 153 F. Supp. 57." (Parentical expression supplied).

Commenting on Section 15(7) of the Act, the Court stated in *Long Island Rail Road Company* v. *United States* (1961), 193 F. Supp. 795, at page 800:

> " . . . It can hardly be doubted that limiting the effectiveness of a rate to one of a number of routes is a 'regulation or practice affecting any rate.' "

Here, the Commission order of July 10, 1959, initiating the investigation specifically referred to the **rate tariffs involved** including as to each "the reference marks bearing an **increased symbol."** This fact is further reflected in the tariffs which were filed with the court below in a rather igno-

minious fashion.[6] Thus, the finding made by the Court is in irreconciliable conflict not only with the Commission order instituting the investigation under review but with the very terms of the statute by which the Court itself says the administrative decision is to be tested, i.e., Section 15(3) and 15(7) of the Interstate Commerce Act.

b.

The District Court persistently referred to the cancellation of routes and even the cancellation of "through" routes embracing Coast Line and Georgia Railroad thereby concluding that such routes "were closed." In fact, the Court fell into hopeless conflict with itself in attempting to describe the schedules involved on page 2 of its opinion:

> " . . . These tariffs cancelled through routes embracing the Georgia Railroad and the Atlantic Coast Line Railroad Company . . . thereby eliminating them from participation in the lowest competitive joint rates on coal . . ."

In contrast with the foregoing the same Court stated in its initial review of these proceedings in *Southern Railway Company* v. *United States, supra,* at page 750:

> "Seeking to eliminate the joint rate as existing for all routes except the direct route, (1), and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission schedules proposing to eliminate the joint rates . . . "

[6]Counsel for Defendant Southern Railway filed several documents (tariffs) which neither constituted a part of the official record nor were served on the parties until several days after the record was closed. No mention of these documents was made to appellants until counsel for defendant invited the Court to examine their copy during the course of his argument and after these appellants had completed their case in chief. Since the court stated that it would be a convenience to them to have the documents, counsel for these appellants stated that no objection would be made if all the parties were properly served a copy of same. While a disarranged copy was handed to one of appellant's counsel when the question was raised, the parties were not served until several days after the record was closed.

Since other traffic is moving over the through Coast Line and Georgia Railroad routes at joint rates in connection with the GS&F today, it was sheer folly for the Court to hold that such routes are "closed." Insofar as coal is concerned, there certainly can be no doubt but that through routes and joint rates were in effect via Coast Line and the Georgia Railroad at the time the Commission entered its investigation into proposed changes by Southern. Such changes would merely increase rates to be applied if the coal traffic was transported via the Coast Line or Georgia Railroad since the joint rates were being cancelled but this would not and did not change the nature of those routes. In fact, both the Commission and the Courts have held that while the existence of a joint rate necessarily presupposes the existence of a through route, a through route may exist though no joint rate has ever been applicable to it. See *Southern Railway Company* v. *United States*, 153 F. Supp. 57, 61, and *United States* v. *Great Northern Railway Company*, 343 U.S. 562, 96 L.Ed. 1142.

In *Thompson* v. *United States* (1952), 343 U.S. 549, 96 L.Ed. 1134, this Court adopted the "holding out" test as to the existence of a through route. However, the fallacy of the lower Court in relying upon the *Thompson* case results from its misstatement of the facts. It says that "Southern no longer holds itself out as offering through transportation service on coal over these routes." In the first place, Southern is not the connecting carrier with Coast Line and the Georgia Railroad for the movement of this coal traffic. Secondly, even if the Court was referring to the GS&F, which is a subsidiary of Southern, the statement is still factually incorrect since the schedules under investigation show the GS&F offers through transportation service on coal in connection with Coast Line and the Georgia Railroad but at higher rates than would be applied in connection with either the Southern or the Central of Georgia. Thirdly, the *Thompson* case certainly does not hold that cancellation of joint

rates change, *ipso facto*, the nature of the routes over which they had been applied as the lower Court otherwise implied. Finally, the *Thompson* case clearly shows that under the factual situation in this case there are still in existence through routes via the Coast Line and Georgia Railroad even under the schedules involved since the only change is that unreasonably higher rates would be applied over those routes than over others as the result of Southern's action herein.

Thus, the Court not only contradicts itself in describing the schedules but cites as authority for its finding that the involved routes are closed a case which certainly does not support such a finding but would in fact be authority for a finding exactly opposite to that made by the Court below.

c.

The District Court, although admitting that it had previously "set aside" the Commission's order of March 19, 1957, held that it was not prejudicial error and indeed lawful for the Commission to continue in full force and effect a part of said order without prior relief from the Federal Court which had set it aside. Such a retroactive but inconsistent conclusion was apparently predicated on the grounds that its previous comments in the initial review concerning the Central of Georgia route constituted *the law of the case*. Especially so, since the Court now says that by virtue of the Commission's action in continuing an administrative order which had been set aside by a Federal Court "Southern was not permitted to file schedules cancelling it."

However, since the administrative order cancelling *all* of Southern's schedules had been set aside by a Federal Court, there is nothing in the Act or in any decision of the Courts construing it or in any of the decisions by the Commission applying it that would have prevented Southern from **publishing** schedules cancelling any of the joint rates on statutory notice unless the *dicta* statements in the initial review

did, as the Court apparently now concludes, constituted the law of the case. To so hold, is tantamount to saying that the Court in its initial review made a final determination as to the "public interest" issue.

Even if it could be argued that it would not have been improvident for the Court to decide the public interest issue, it was not and could not have been a final determination for the simple reason that the case was remanded to the Commission for further proceedings. The whole proceeding thereafter was *in fieri* and the Commission had a perfect right on reconsideration to make a new record. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364.

When the proceedings were reopened all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because Congress, notwithstanding its interlocutory character, had made it appealable.

The statute, however, does not require an aggrieved party to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. The aggrieved party may, therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case as the appellants are doing here. See *Victor Talking Machine Co.* v. *George*, 105 F. 2d 697, Certiorari denied 308 U.S. 611. Thus, it requires a final judgment to sustain the application of the rule of "the law of the case," which is a discretional rule of practice and is not controlling here. See *Southern R. Co.* v. *Clift*, 260 U.S. 316; *United States* v. *United States Smelting R and M. Co.*, 339 U.S. 186, 198, 199, Rehearing denied 339 U.S. 972.

Here, the Commission continued in full force and effect the order vacated by the Court without making any attempt

to "so shape its report" which contained findings upon which that order was bottomed. Instead, on March 23, 1959, the Commission merely *modified* its prior order or conclusions without changing the findings or reasons which purportedly supported that order. Such action led to an unlawful and completely illogical result as the *modification* in the order permitted that which the findings in the report would not permit. Thus, before the ink was hardly dry on the Court's decision, the Commission had done precisely that which the Court had condemned, i.e. issued an order not supported by basic findings essential to its validity.

Insofar as the damage to plaintiffs is concerned, Southern Railway puts its finger directly on the pulse of the situation at page 14 of its brief before the Court below, wherein it explained the effect of such action by stating:

> "In other words, as to those two [Atlantic Coast Line and Georgia Railroad] routes . . . the Commission acted reasonably and equitably in modifying its original order . . . *so as not to forbid cancellation of the two routes.*"

Thus, in view of the foregoing, it necessarily follows that such a modification or ruling could have had, and we contended that it did have, a direct bearing upon whether like schedules, subsequently published by Southern, would be suspended by the Board of Suspension.[7] As a matter of fact, the suspension Board did act "so as not to forbid the cancellation of the two routes" and the unlawful order thereby predetermined the issue before such Board and in its decision to investigate rather than suspend those schedules in I.C.C. Docket No. 33128.

Thus, in addition to being beyond the power of an administrative body to continue in effect a part of its order which had been vacated by a Federal Court, the Commission

[7] A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U.S.C.A. § 17(2). Section 7.3, 20 F.R. 5031-5035, July 19, 1955.

did precisely that which the Court below had initially condemned but now finds is lawful, i.e., issuance of an order not supported by basic findings essential to its validity.

d.

The District Court held that the schedules do not run counter to the discriminatory provisions of Section 3(4) of the Interstate Commerce Act because the equality of treatment required in that statute "involves comparable conditions and the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia" and "we are not here concerned with switching or terminal services". Such statements are certainly not sufficient in law or in fact to qualify the mandatory provisions of that statute which this Court has held "outlaws discrimination in all its forms". *Dixie Carriers* v. *United States*, (1956), 351 U.S. 56, 61, 100 L.Ed. 934.

Insofar as comparable conditions are concerned, the mileage from the point where discrimination is charged is either less or identical in performing the service for the railroads discriminated against as compared with the service performed for the preferred railroads. Moreover, there is absolutely nothing in the record to show that the expense is even a penny more for performing that service in connection with the former than in connection with the latter.

Here, services performed by the GS&F are the same at Macon whether the Central of Georgia or Georgia Railroad car is tendered under joint rates and through route arrangements which have been in effect for more than half a century. Morevover, the Court stated in *Pennsylvania Co.* v. *United States*, 214 F. 445, 449, if a reasonable compensation is fixed for the service *the carrier may not inquire into the route over which it has been moved* to reach its rails merely to decide whether or not it will transport the car offered. This decision

was affirmed by the United States Supreme Court in *Pennsylvania Co. v. United States*, 236 U.S. 351.

Oddly enough, on the circuity aspect of the public interest issue, the lower Court stated in its initial review that it was fruitless to consider the movement of the traffic before it reached the junction point at Atlanta and the Commission, apparently believing this to be the law of the case as Southern contended, based its findings as to this aspect of the public interest issue on what the Court said which the latter now says was a valid finding. On the other hand, the Court now says that consideration must be given to the entire route, not just a segment thereof, in determining the discriminatory issue. In fact, it makes a finding *de novo* which the Commission was unable or unwilling to make, i.e., no consideration should be given to switching or terminal services at the point where the discrimination is charged.

The method by which circuity of routes is measured to determine wasteful operation, as used by the Court in its initial review, certainly did not constitute the law of the case and the entire route should have been taken into consideration rather than a segment thereof insofar as the public interest issue was concerned. Conversely, only the services performed by the carrier charged with discrimination at the point where such discrimination is charged should be considered in determining whether there is a violation of Section 3(4). What other carriers do, not so charged, is completely irrelevant as is the transportation services performed prior to the time that the traffic reaches the point where discrimination is charged. Thus, only a comparison of the services performed by GS&F for its connecting carriers at Macon or Cordele is relevant as to whether it discriminates against one or more of those connecting carriers in its rates or charges for like or similar services. To hold otherwise, as the lower Court did here, would be to ignore the unqualified provisions of the statute.

It is the unequivocal duty of a railroad to treat its rail connections on an equality basis, particularly where, as here, through routes and joint rates have been in effect for a half century or more. In fact, such treatment is made mandatory by statute since Section 3(4) of the Interstate Commerce Act specifically provides that rail carriers:

> " . . . shall not discriminate in their rates . . . and charges between connecting carriers. . . ."

Thus, a rate lawful in all other respects is, nevertheless, unlawful by the terms of the aforementioned statute if it discriminates between connecting carriers. Both the Courts and the Commission have condemned efforts to explain away the mandatory provisions of that statute since the discrimination prohibited is to be tested by matters of substance. Here, the lower Court made a feeble attempt to distinguish the cases applying that statute with the case at Bar on the basis of the services involved in those cases as compared with the services involved herein citing *Louisville & N. R. Co.* v. *United States*, 238 U.S. 1, as authority for such a proposition. However, the appellants in that case attempted to do precisely what the lower Court concluded here by insisting that *Pennsylvania Co.* v. *United States, supra*, did not involve *switching* but *transportation*. Such an attempt to explain away the mandatory provisions of the statute was condemned by the Supreme Court in the *Louisville and N. R. Co.* case, *supra*, at page 20:

> " . . . but the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing."

Since other traffic is still being interchanged between the Georgia Railroad and the GS&F at Macon, it is rank discrimination to single out this coal traffic and say that higher

rates should be assessed when a car is received from the Georgia Railroad than when received from the Central of Georgia or Southern. Considering such a situation in the *Louisville and N. R. Co.* case, *supra*, the United States Supreme Court said at page 19:

> "In substance, that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others."

Particularly so, in view of the fact that all of the equipment used in transporting this coal is owned by the originating carriers, i.e., the L&N, one of the appellants herein. In fact, the evidence of record clearly shows that under Southern's routing restrictions, the L&N is permitted to deliver traffic to the Southern Railway and Central of Georgia at Atlanta, but is not permitted to deliver traffic to the Atlantic Coast Line and Georgia Railroad at the lowest applicable joint rate applying from involved mine origins to the destinations here involved (Tr. 274, 349, 350). Whereas, in *Louisville and Nashville Railroad Company, Merger, etc.*, 295 I.C.C. 457, the Commission stated:

> "We deem it imperative, however, that our order approving the merger be conditional so as to insure the maintenance of all existing joint routes . . . "

The joint routes referred to above include the Coast Line and Georgia Railroad routes here involved. Southern took an active part in that proceeding and insisted on the above-quoted provision being made a condition precedent to the Commission's approval of the merger. Moreover, in view of this condition which was made in the public interest, it seems only logical that if the originating carrier of the traffic here involved could not cancel or commercially close the routes in question, an intermediate carrier should not be allowed to do so.

Thus, the finding by the lower Court is not only unsupported by statute or case law but is completely illogical. Moreover, it was a finding *de novo* which the Commission was unable or unwilling to make, i.e., no consideration should be given to switching or terminal services. In fact, as the Supreme Court said in *U. S.* v. *Champlin Refining Co.*, 341 U.S. 290, 301:

> "... On appeal from a specially constituted Three-Judge District Court refusing to enforce an order of the Interstate Commerce Commission, it is not the function of the United States Supreme Court to rescue the Commission by making findings de novo which the Commission itself was unable or unwilling to make. ..."

Certainly if such action is beyond the function of the United States Supreme Court, it is likewise beyond the function of the District Court.

e

The District Court held that the findings made by the Commission are warranted in law and in fact when tested by the admonition of Sections 15(3) and 15(7) of the Interstate Commerce Act. In doing so, however, the lower Court attributed findings to the Commission which had not been made and failed to properly evaluate the findings which the Commission did make in the light of the statutes relied upon.

The first two so called "findings" which the lower Court attributes to the Commission are based on a comparison [not between the restricted (Coast Line and Georgia Railroad) routes and the unrestricted (Southern and Central of Georgia) routes but] between the restricted routes and the Southern route. On that basis, the restricted routes are said to (1) be "*unduly* circuitous resulting in an operation at an *unnecessarily* higher cost than was the case over the Southern route," and (2) involve "an additional interchange ... either at Macon or Cordele as compared with the route of the

Southern." To begin with, the Commission did not make a finding that the restricted routes resulted in an operation at higher cost—much less an unnecessarily higher cost—than was the case over the Southern or the Central of Georgia route. In fact, it would have been impossible for the Commission to make such a finding since there is absolutely nothing in the record to show that the expense is even a penny more when the GS&F handles this traffic for one connecting carrier than when it handles it for another connecting carrier. Moreover, in attempting to meet its burden of proof, Southern did not show the cost of operation over any segment of any line.

Insofar as the undue circuity was concerned, the Commission merely quoted the comments of the Court on the circuity aspect of the public interest issue and, apparently assuming that such was the law of the case as Southern had contended at the hearing, stated:

> "In addition to the undue circuity of the Georgia Railroad and Coast Line routes as compared with the direct Southern route, an additional interchange is required at Macon or Cordele."

As to the "additional" interchange at Macon, this constitutes nothing more than a *negative pregnant* as it would neither justify cancellation of joint rates via those routes nor qualify the discrimination charged since the unrestricted Central of Georgia route would also require an "additional" interchange at Macon. In addition, the Commission admitted that the interchange between the L&N and Coast Line at Atlanta had been eliminated thereby resulting in less interchanges being required via the restricted Coast Line route than via the unrestricted Central of Georgia route and the identical number of interchanges being required via the Coast Line route as compared with the route of Southern.

Referring to a third so-called "finding," the Court stated that "it was held also that there was no showing of any

shipper need for the routes." While the Commission referred to the shipper testimony in setting forth the contentions of the parties, it did not make a finding that such testimony expressed a desire "to have as many competing lines available as possible" nor that the expressions of fear concerning the diminution of service via the Georgia Railroad was "unsubstantial." The fact of the matter is that the Commission failed to make any finding with respect to shipper testimony. However, those fears should not have been so callously disregarded for the case at Bar represents but one of many attempts by Southern Railway to effectuate a fantastic and vicious routing program involving the use of unreasonable and often discriminatory practices which have been repeatedly condemned by the Commission and the Courts. See *Alabama Great Southern Railroad Co.* v. *United States*, 162 F. Supp. 614; *Southern Railway Co.* v. *United States*, 154 F. Supp. 562; *Southern Railway Co.* v. United States, 153 F. Supp. 57; *Southern Railway Company* v. United States, 166 F. Supp. 78. In other words, Southern's restrictive routing program is not limited to coal and the evidence of record clearly shows that its action in this instance will result in a diminution of service both on this and other traffic moving via Coast Line and the Georgia Railroad.

The so-called fourth and fifth "findings" which the lower Court attributes to the Commission are that (1) the loss of this traffic would have no significant effect on the total interchange between the Georgia and GS&F at Macon and (2) the coal traffic was not profitable to the Coast Line and Georgia Railroad. While the Commission did say that the loss of this traffic "would not appear" to have a significant effect on the total interchange there was certainly no finding to that effect. As to the profitability of this traffic to Coast Line and Georgia Railroad, the record shows that such traffic is undeniably remunerative to those carriers (Tr. 271, 272, 307, 308, 317). This is particularly true when considering

the fact that this coal is overhead traffic to the Georgia Railroad and Atlantic Coast Line, involving no loss and damage claims, and that it is handled in trains over those railroads that are not now being operated to capacity (Tr. 291, 292, 394, 409).

Here, the 164 cars handled by the Georgia Railroad in 1958 produced revenue of $69.17 per car which, with the exception of cement, is greater than any other eight principal commodities handled by that railroad in connection with the GS&F route as far as per car earning are concerned (Tr. 271, 272). As to the Atlantic Coast Line route, the coal traffic yielded per-car revenue of $65.36 which is higher than the per-car revenue on sand and gravel or crushed stone and compares favorably with the per-car revenue received on pulpwood by that railroad (Tr. 307, 308).

While the Commission stated that the statistical exercise engaged in by Southern at the hearing "indicated" the non-profitability of this traffic to protestants, appelants herein, there was certainly no finding to that effect. In that statistical exercise, the *system* average operating expenses were compared with the average revenue per loaded car-mile to determine whether the traffic would be profitable to the involved railroads but such a determination is impossible on that basis and it completely distort the picture since the record shows that this traffic moves in blocks of five to 10 cars (Tr. 11, Exhibit No. 57). Moreover, the ridiculous nature of such a comparison was specifically explained in plantiffs' brief (P. 39-41) and need not be reiterated here since the Commission did not make a finding with respect thereto.

Thus, those findings were not warranted in fact as many of them were erroneously attributed to the Commission and others were not bottomed on a rational basis or the product of reason and judgment. As to their justification in law, the District Court held that they should be tested by the admo-

mition of Section 15(3) and 15(7) of the Interstate Commerce Act but failed to apply those statutes to the facts. Moreover, the Court omitted pertinent portions of Section 15(3) and failed to show where the Commission had ever mentioned Section 15(7) — much less applied same — in reaching the decision under review.

In quoting Section 15(3) of the Act, the District Court conveniently omitted the fact that the statute involves cancellation of any "joint rate, fare, charge or classification" and that the buden of proof shall be upon the carrier or carriers opposing such cancellation "without regard to the provisions of Paragraph (4) of this section" concerning a reasonable preference that should be given to the carrier which originates the traffic when the Commission is prescribing through routes. The Commission was not called upon to prescribe through routes in this case and that which should have been disregarded, by the very terms of the statute, is precisely the basis upon which Southern attempted to meet its burden of proof as reflected in the lower Court's initial opinion in *Southern Railway* v. *United States, supra*, at page 750:

> "Seeking to eliminate the joint rate as existing for all routes except the direct route, (1), and **thus obtaining for itself the maximum haul without effective competition,** the Southern filed with the Commission schedules proposing to eliminate the joint rate . . ."

As to Section 15(7), the District Court points out by quoting from the statute that it is specifically and primarily concerned with investigations into the **lawfulness** of any individual or joint rate without any reference to "consistency with the public interest." Even so, the lower Court holds that the schedules must be tested by this statute but makes a finding that rates are not involved, in complete disregard to the very statutes upon which it relies.

Certainly the findings made by the Commission on re-

mand are no better than those initially condemned by the lower Court and the mere fact that the conclusions have changed in conformity with dictum statements made by the Court does not justify those findings in fact or in law. Therefore, in the absence of a rational basis, not only should the Commission's decision have been set aside but the opinion of the Court reviewing it should be reversed for the same reasons. In fact, the Supreme Court in reversing a lower court which would have enforced an administrative order called attention to legislative criticism directed against the courts for not exacting higher standards on appeal than those exercised by the agencies in *Universal Camera Corp.* v. *National L. R. Board*, 340 U.S. 474, 484:

> " . . . The 'substantial evidence' rule set forth in Section 10(e) [of the Administrative Procedure Act] is exceedingly important . . . the difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less — to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. . . . "

Even a cursory review of the opinion by the lower Court clearly reveals that only "lip service" was given to those standards; particularly so, in the light of the evidence of record and the Commission proceedings under review. Therefore, to allow such an opinion to stand would render those time-honored standards meaningless and virtually make a mockery of judicial review.

CONCLUSION

Whether form should supplant substance as a standard for judicial review of administrative decisions; whether an

interlocutory decision by a court or administrative agency may either eliminate prior issues properly raised or constitute the "law of the case"; whether the Interstate Commerce Commission or any administrative agency has the power to continue in full force and effect a prior administrative order which has been vacated by a Federal Court without relief from the court that set it aside; whether it is the function of a specially constituted Three-Judge Court to make findings *de novo* which the administrative agency whose proceeding it is reviewing was unable or unwilling to make; and whether the provisions of Section 3(4) of the Interstate Commerce Act effectively declare discrimination between connecting carriers to be unlawful in all its forms or to what extent such provisions may be qualified or limited present substantial questions for the consideration of this Court.

In fact, the answers to those questions are of vital importance as a means of providing an orderly procedure by which parties appearing before administrative agencies and the courts may be accorded the fundamental rights of justice and fair play which are implicit in our concept of ordered society.

Respectfully submitted,

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PROOF OF SERVICE

I, Albert B. Russ, Jr., one of the attorneys for plaintiffs and intervening plaintiffs, appellants herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of July, 1962, I served copies of the foregoing **statement as to jurisdiction,** together with the separate appendices attached thereto, on the several parties of record, as follows:

(1) On the United States, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to the Attorney General, Department of Justice, Washington 25, D. C., and to Floyd M. Buford, Esquire, United States Attorney for the Middle District of Georgia, U. S. Post Office Building, Macon, Georgia.

(2) On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Messrs. Leonard S. Goodman and Robert W. Ginnane, its Counsel, to the office of the Commission, Washington 25, D. C., and,

(3) On Southern Railway and Georgia, Southern and Florida Railway, intervening defendants before the Court below, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective Attorneys of Record, i.e., (1) Mr. R. Granville Curry, 631 Southern Building, Washington 5, D. C.; (2) Mr. Henry J. Karison, Southern Railway Building, Washington 13, D. C., and (3) Mr. Charles J. Bloch, 520 First National Bank Building, Macon, Georgia.

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IN THE

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL

Appellants

v.

UNITED STATES OF AMERICA, ET AL

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

APPENDIX TO JURISDICTIONAL STATEMENT

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July 1962

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IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF GEORGIA

SOUTHERN RAILWAY COMPANY
and GEORGIA SOUTHERN AND
FLORIDA RAILWAY COMPANY,

Plaintiffs, CIVIL ACTION
NO. 1462

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE
COMMISSION,

Defendants.

This is a proceeding by the Southern Railway Company to have set aside the report and order of the Interstate Commerce Commission in Docket No. I. & S. 6538, Routing, Coal, Louisville & Nashville Railroad and Nashville, Chattanooga & St. Louis Railway to Georgia Southern and Florida Railway, requiring the cancellation of certain tariffs wherein Southern Railway Company and its subsidiary, Georgia Southern and Florida Railway Company, proposed to eliminate the participation of certain routes embracing intermediate carriers between Atlanta and Macon or Cordele, Georgia, in the lowest competitive joint rates on coal moving from origin mines on the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company to stations on the Georgia Southern & Florida Railway north of the Jacksonville-Chattahoochee, Florida, line of the Seaboard Air Line Railroad Company. The report of the Commission (Division 2) may be found at 300 I.C.C. 125.

For many years there has been in effect a joint rate on coal originating on the lines of the L. & N. and N.C. & St.L. (hereinafter sometimes collectively called L. & N.) and the several roads covering the following four routes:

(1) Louisville and Nashville to Atlanta; Southern to Macon; Georgia Southern to destination.

(2) Louisville and Nashville to Atlanta; Georgia Railroad to Macon; Georgia Southern to destination.

(3) Louisville and Nashville to Atlanta; Central of Georgia to Macon; Georgia Southern to destination.

(4) Louisville and Nashville to Atlanta; Atlantic Coast Line to Cordele; Georgia Southern to destination.

The Georgia Southern is a subsidiary of the Southern Railway Company and is operated as an integral part of the Southern system. Thus, in each of the above routes, final delivery is made by the Southern.

The Commission made findings to the effect that, from the common gateway, Atlanta, the distances to Warner Robins, Georgia, called by the Commission in its brief here, "a representative destination" are for the several numbered routes: (1) 104 miles; (2) 219 miles; (3) 119 miles; (4) 220 miles. Each of them requires an interchange of cars at Atlanta, and each of them, except No. (1), requires a second interchange at Macon in routes (2) and (3), and at Cordele in route (4). In the case of No. (4), Coast Line from Atlanta and Georgia Southern to Warner Robins, there is a back-haul of approximately 48 miles.

Seeking to eliminate the joint rate as existing for all routes except the direct route, No. (1), and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission schedules proposing to eliminate the joint rates. The Commission ordered a suspension of the proposed schedules, and the hearings resulting in the challenged order follow. The L. & N. and all other [redacted]ted carriers intervened in opposition to the Southern.

The following statement of facts is taken from the Report of the Commission:

"The principal movement of coal in 1955 from these mines over the above routes was to Warner Robins, Ga., where an Air Force base is located. This base is on the Georgia Southern 16 miles south of Macon and 48.5 miles north of Cordele. The respondents compare the short-line distances from Atlanta to Warner Robins, 104 miles, with distances over routes involving the Central of Georgia, the Georgia Railroad, and the Coast Line, 119, 219, and 220 miles, respectively. Using Windrock, Tenn., a point in Louisville & Nashville mine group 1, as representative, the short-line distance therefrom to Atlanta, thence the Southern to Warner Robins, is 335 miles, as compared with 352, 452, and 453 miles, respectively, from the same origin over routes beyond Atlanta of the Central of Georgia, the Georgia Railroad, and the Coast Line, respectively, to the same destination. The latter routes are 5.1, 34.9, and 35.2 percent longer than the short-line route over the Southern, and do not appear to be unduly circuitous.

"A traffic study of coal moved from mines on the Louisville & Nashville and the Nashville, Chattanooga & St. Louis over these routes to Warner Robins and other stations on the Georgia Southern in 1955, disclosed that 2,030 carloads originated at mines on the Louisville & Nashville, and 12 carloads at mines on the Nashville, Chattanooga & St. Louis. All of the latter shipments moved to Warner Robins, 1 over the Central of Georgia route and 11 over the Georgia Railroad route. Of the 2,030 carloads from mines on the Louisville & Nashville, 524 moved to Warner Robins, of which 219 (41.8 percent), 114 (21.7 percent), 117 (22.3 percent), and 74 (14.2 percent) moved from Atlanta over the Southern, the Central of Georgia, the Georgia Railroad, and the Coast Line, respectively. Of the remaining 1,506 carloads, 1,485 (98.6 percent), 4 (0.4 percent), 1 (0.07 percent), and 16 (1.06 percent) moved over the Southern, the Central of Georgia, the Georgia Railroad, and the Coast Line, respectively. It thus appears that the great bulk of this traffic, except to Warner Robins, moved over the more direct route of the Southern, and that to

Warner Robins somewhat less than half of the shipments moved over that route.

"A witness for the Harlan County Coal Operators Association, whose members own mines in Harlan and Bell Counties, Ky., served by the Louisville & Nashville, testified that the bulk of the coal traffic of its members to these stations on the Georgia Southern, other than Warner Robins, moves over the direct route of the Southern from Atlanta through Macon. Because of the mountainous terrain in which these mines are located, the tracks of each are long enough to accommodate only 1 day's supply of empty and loaded cars. These operators are dependent upon a continuous car supply and *prefer not* to have to rely upon one railroad beyond the originating carrier's junction as a source of empty-car supply. Thus, these mines, being generally served by a single originating carrier, *urge* that they would be placed at a serious disadvantage in the absence of alternate routes beyond such junction, and would risk *possible* delays in the delivery of loaded cars, and the return of empties. A witness for the Penn-Dixie Cement Corporation, located at Clinchfield, Ga., a point midway between Macon and Cordele, and a receiver of large quantities of coal used in the manufacture of cement, stated that in 1955 some 1,400 carloads of coal moved to its plant mainly from mines on the Louisville & Nashville, and mostly over the direct route of the Southern from Atlanta. *Both witnesses admitted that the service over the latter route was adequate and satisfactory*, but they are *opposed* to the routing restrictions mainly on the ground that they *might be* handicapped at times in moving their traffic if dependent upon a single route. They *ask* that all these routes be continued as a guard against delays caused by landslides, washouts, derailments, strikes, or other *contingencies* which *might* interfere with their daily empty-car or coal supply. No one connected with the Air Force base at Warner Robins protested or appeared in opposition to the proposed restrictive routing. [Emphasis added.]

"....

"In 1955, the Georgia Railroad interchanged at Ma-

con a total of 2,142 carloads. Of this total, 576 carloads, or 26.9 percent, constituted traffic handled in connection with the Georgia Southern, of which 122 cars or 5.7 percent contained coal. The Georgia Railroad enters Macon over a branch line diverging from its main line at Camak, Ga., which is called the Macon division. This division is 78 miles in length, and constitutes about 25 percent of the total mileage of the Georgia Railroad. In 1954, that division contributed 10.66 percent of the total revenue earned by the carrier, and is characterized as a marginal operation. The Georgia Railroad and the Louisville & Nashville maintain joint terminal facilities at Atlanta so as to enable both to handle efficiently and economically traffic interchanged between them. Coal traffic from mines on the Louisville & Nashville destined to points beyond Atlanta was a persuasive factor in projecting those facilities. See Coal and Coal Briquets in the South, 289 I.C.C. 341, 362-363 [Presumably to other points as well as those on the Georgia Southern.]

"The Coast Line *urges* that the elimination of its route from Atlanta through Cordele to destinations on the Georgia Southern on this traffic would increase the cost of maintaining the service and impair its ability to continue to provide such service in the future.

. . . .

"As indicated, the Southern handled in 1955 from Atlanta practically all of the traffic here concerned, destined to points on the Georgia Southern, except to the Warner Robins Air Force base, and to that point it handled 41.8 percent, the remaining 58.2 percent having been divided among the 3 protestant bridge lines. As stated, the shipper witnesses indicated that the route of the Southern from Atlanta is satisfactory to them. It is thus reasonably certain that the great bulk of their traffic would continue to move over the Southern if the present routes were continued."

The examiner made his findings and report recommending approval of the proposed schedules. The Commission Division No. 2 sustained intervenors' exceptions to the ex-

aminer's report and entered its order cancelling the schedule, one member dissenting. Upon petition for reconsideration, the entire Commission entered its order denying the petition.

Inasmuch as our disposition of the case is based on the nature of the findings and conclusions of the Commission we deem it important to quote them in full:

> "While no representative appeared at the hearing in behalf of the Warner Robins Air Force base, section 6(8) of the Interstate Commerce Act provides that in time of war or threatened war carriers shall adopt every means within their control to facilitate and expedite military traffic, and in time of peace that deliveries of Government traffic to agents of the United States shall be made as promptly as possible. Thus, whether in time of war or peace, every reasonable effort must be made to expedite the transportation of traffic consigned to agents of the United States, and this includes traffic to the Air Force base at Warner Robins. Under the national transportation policy, the Commission is charged with the duty of promoting adequate, economical, and efficient service, and of fostering sound economic conditions in transportation and among the several carriers, to the end of developing, coordinating, and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.
>
> "Section 15(3) of the act provides that in instances where through routes or joint rates are canceled without the consent of all carriers parties thereto or authorization by the Commission, and are suspended for investigation, the burden of proof is upon the carriers proposing the cancellation to show that it is consistent with the public interest, without regard to the short-hauling or other provisions of section 15(4). The only reason given by the respondents for the proposed restrictive routing is to protect their long haul, to eliminate the bridge lines which they urge involve circuitous and time-consuming transportation, and to channel the traffic to what they believe to be a more efficient and ecocomical route.

"As stated, the bridge routes sought to be eliminated are not unduly circuitous, and the shipper testimony before us is in favor of continuing those routes. Considering our duties under the national transportation policy to maintain a transportation system adequate to meet the needs of commerce generally and of the national defense, we are not satisfied that the respondents have met the burden resting upon them of showing that the cancellation of the bridge routes proposed would be consistent with the public interest.

"...

" . . . We find that the proposed cancellation of joint rates and routes is not shown to be just and reasonable."

Thus, it is clear that the Commission based its decision that the cancellation of the bridge routes would not be consistent with the public interest on three propositions: (1) the routes identified above as (2), (3) and (4) are not unduly circuitous; (2) shipper testimony is in favor of continuing those routes; and (3) the needs of commerce generally and of the national defense require the maintenance of the status quo.

There should not, at this late date, be much dispute over the scope of the court's review of actions of the Interstate Commerce Commission. Undoubtedly the Interstate Commerce Act charges the Commission with the duty of promoting "adequate, economical, and efficient service, and of fostering sound economic conditions in transportation." It is also obvious that some of these requirements may be mutually inconsistent in particular situations. For example a sound economic condition in transportation may require a balance between the wasteful duplication of facilities and services on the one hand and the need for healthy competition on the other. The balancing of these demands is, we think, peculiarly within the jurisdiction of the Commission. Thus, in addition to the usual injunction that the courts must not upset factual determinations of administrative tri-

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bunals, if supported by adequate findings, of fact based on substantial evidence from the record as a whole, we are here required to recognize that there are also certain quasi policy determinations that are inviolate insofar as they are shown to be made within the framework of the law and on an adequate factual basis.[1]

Plaintiff here contends that the Commission's order is erroneous because it is clearly based on an improper construction of Section 6(8) of the Interstate Commerce Act,[2] whose application to the proven facts here vitiate the conclusions, and that, aside from the national defense ground, the Commission's conclusions are not based on specific findings having adequate support in the evidence.

The Commission replies that the reference in the order to Section 6(8) is illustrative only and is not made the basis of the holding, and even if "inappropriate," this would be no basis for setting the order aside. It further argues that "all required findings were made and that its conclusion is a natural one."

We conclude that on the present record the decision of the Commission cannot stand. It is not fruitful to belabor the question whether the percentage of circuity of the bridge

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[1] For a discussion of the scope of review in different situations see Interstate Commerce Commission v. Union Pacific R.R. Co., 222 U. S. 541; Mississippi Valley Barge Line v. United States, 292 U.S. 282, 286; Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488; East Texas Motor Freight Line v. Frozen Foods Express, 351 U.S. 49, 54; Scofield Transportation Co. v. United States, 355 U.S. 83, 88.

[2] "Preference to shipments for United States. In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned."
49 U.S.C.A. §6(8).

routes is to be determined by taking the straight line (Southern route) distance between the gateway at Atlanta to destination or by taking into consideration the added distance over the L. & N. before the coal is delivered to one or the other of the indicated routes. It stands without possibility of contradiction that as to two of the bridge routes, Nos. (2) and (4), the distance from the interchange at Atlanta to the selected destination is more than twice as long as the shortest route — 219 and 220 to 104, respectively. It is also undisputed that such routes involve an additional interchange to the Southern either at Macon or at Cordele. A strong case was made in the record that this amount of "circuity" was uneconomical. It can hardly be questioned that in the classical economic sense there is a waste or loss in the extra haulage involved in carrying any commodity twice as far as is necessary. The record here discloses without dispute that this economic loss is also a practical one. It is, of course, a loss which in the long run must ultimately be borne by the public, and it is thus one which it is the duty of the Commission to seek to avoid, unless there are countervailing considerations.

Use of the words "economical" and "economic" in the National Transportation Policy cleary demonstrates the intent of Congress that one of the primary concerns of Congress is to have the Commission give serious attention to the matter of providing economical transportation; that is, transportation at as low rates to the public as may be consistent with the other requirements of the Policy. We think it not amiss to note that following a special report of a subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, and a special message from the Secretary of Commerce, Congress, at the session just ended, passed legislation to make funds available to the railroads. 72 Stat. 568, 1958 U.S. Code Congressional and Administrative News, 2969. The whole import of this

legislation is that funds for the development of needed facilities for the railroads are not available at current interest rates or in the capital market from ordinary commercial sources. A significant comment appears in the subcommittee report which is part of the legislative history of this amendment to the Interstate Commerce Act:

> "The railroad industry has not, in the subcommittee's opinion been sufficiently interested in self-help in such matters as . . . abolishing of unnecessarily circuitous routes for freight movements."

Wasteful operation, regardless of what particular carrier suffers the economic loss temporarily, is one of the things to be avoided if the elimination of the wasteful procedure does not run counter to other mandates of the Act.

We think therefore, that on his affirmative showing the Southern clearly carried the initial burden of proving that the cancellation of the two bridge routes (2) and (4) was just and reasonable and consistent with the public interest. But, as we have said, it is the Commission's duty to weigh and adjust conflicting interests. Among the considerations which it might properly weigh to counteract the prima facie case made by the plaintiff are: the need for competing lines in this particular traffic; the need for the interchanges between carriers for continued efficient transportation of this traffic or in general; the effect on such interchange and on the carriers concerned in relation to their ability to furnish the adequate service if and when needed for the national defense.

The difficulty we have in reviewing the Commission's order here is that no basic findings are made as to any of these considerations. Whatever is said in the Commission's report bearing on these matters is stated merely as the contentions of the intervenors. (See the italicized portions of the quoted findings above.) There is no finding, for instance, that deprivation of the Georgia Railroad of the traffic it

carries on this joint route will jeopardize either the maintenance of the interchange between that road and the Southern at Macon or the economic position of the road generally. There is no finding that this small amount of traffic in fact strengthens the Georgia Railroad (which may well be questioned in light of the length of the haul for the tariff received). So also with the Coast Line. So, too, with respect to the other considerations, at least some of which must be put forward by the Commission to negative the otherwise established claim of the Southern for relief.

We think the reference to Section 6 (8) in the Commission's order is inappropriate. This is true for two reasons. In the first place no findings of fact are made to bring this provision into play, such, for instance, as a finding of the existence of threatened war, or any request by the President, necessary to make applicable the first part of the section, or such as a finding that the joint routes are necessary to permit delivery "as promptly as possible" in time of peace. In the second place no findings of fact support the implied conclusion that the prompt delivery of shipments to the government's installations either in time of war or peace is dependent on the maintenance of *joint routes*, as distinguished from the maitenance of *joint* facilities. On the record, there seems not to be any suggestion that in time of emergency the expediting of shipments, under the terms of Section 6(8), would be affected in the least by whether joint tariffs were in effect.

The shipper testimony is not sufficient to amount to more than the usual wish of shippers to have as many competing lines available to them as possible. The Commission made no finding that the wishes of the two shipper witnesses were warranted by a single fact in the record. It merely stated the shipper's desires.

To the extent that the Commission's finding that the two longest routes "are not unduly circuitous" is intended to

mean that they are not undesirable from an economic standpoint, the record does not support the conclusion, and such finding is clearly erroneous. As to the Central of Georgia route, we cannot say the same. The route is so little longer than that of the Southern that we cannot overrule the Commission's finding that as to that route the Southern failed to carry its burden of showing its elimination is consistent with the public interest.

The failure of the Commission to make findings of facts which could be considered as offsetting the clear proof of the wasteful circuity of routes (2) and (4) makes it impossible for us to determine whether it made the determination between conflicting interests which determination it alone may make.

As said in Schaffer Transp. Co. v. United States, 355 U.S. 83 at page 88:

> " . . . But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own motions of the public interest we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

It is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it. It is possible for the Commission so to shape its report and order as to permit the schedule to stand so far as they eliminate routes Nos. (2) and (4) but not No. (3). [We do not even conclude that the Commission must do this. We do conclude that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden

of showing that the elimination of routes (2) and (4) is consistent with the public interest.]

The order of the Commission is set aside and the case is remanded to the Commission for further proceedings in conformity with this opinion.

This 22 day of September, 1958.

/s/ Elbert P. Tuttle

ELBERT P. TUTTLE
UNITED STATES CIRCUIT JUDGE

/s/ T. Hoyt Davis

T. HOYT DAVIS
UNITED STATES DISTRICT JUDGE

/s/ W. A. Bootle

W. A. BOOTLE
UNITED STATES DISTRICT JUDGE

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF GEORGIA

CIVIL ACTION NO. 1811

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
Plaintiffs

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants

Before BELL, Circuit Judge, and BOOTLE and MORGAN, District Judges BELL, Circuit Judge:

This is an action brought under 28 USCA, Section 1336, 1398, and 2321-2325 by plaintiffs, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Georgia Rail Road & Banking Company, operated as Georgia Railroad by its lessees, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company against the United States to annul and set aside a report and order of the Interstate Commerce Commission, entered on May 19, 1961, in the proceeding entitled *Routing, Coal from Origins on Louisville & N.R.*, 313 I.C.C. 752, and an order of September 13, 1961 denying a petition for reconsideration.[1]

The report and order found certain tariffs or schedules of the Southern Railway Company and its subsidiary, Geor-

[1]Harlan County Coal Operators' Association, Mead Corporation and Georgia Kraft Company, a corporation having its principal office in Macon, Georgia, were allowed to intervene as additional plaintiffs. The Interstate Commerce Commission, Southern Railway Company and Georgia, Southern and Florida Railway Company were allowed to intervene as additional defendants.

gia Southern and Florida Railway Company, to be reasonable, just and consistent with the public interest. These tariffs cancelled through routes embracing the Georgia Railroad and the Atlantic Coast Line Railroad Company, as intermediate carriers between Atlanta and Macon or Cordele, Georgia, thereby eliminating them from participation in the lowest competitive joint rates on coal moving from origin mines on the Louisville and Nashville Railroad Company to certain stations on Southern's subsidiary, the Georgia Southern and Florida Railway Company. This report and order was entered on further hearing after the remand order of this Court in *Southern Railway Co. v. United States;* 167 F. Supp. 747 which concerned the report and order of the Commission dated March 19, 1957, in the titled proceeding. 300 I.C.C. 125. The Commission proceeding was under Investigation and Suspension Docket No. 6538. The hearing there and the report and order here also embraces Suspension Docket No. 33128 of the Commission.

Following the remand order plaintiffs successfully sought to reopen the proceeding for further hearing. The Commission also vacated its previous order requiring Southern to cancel its tariff or schedule restrictions closing the Georgia Railroad and Coast Line routes. The order was continued in effect as to the through route of the Central of Georgia Railway Company with the result that Southern was not permitted to file schedules cancelling it. The original controversy was thereby narrowed to the cancellation of only two through routes when Southern filed new schedules eliminating these routes of the Georgia and Coast Line. Plaintiffs protested the schedules and requested their suspension pending the hearing in the reopened proceeding. The Commission declined to suspend, but entered an order of investigation. Docket No. 33128, supra. The schedules became effective as published.

The Examiner, after hearing, found the schedules can-

celling these routes to be just and reasonable and not otherwise unlawful, and the Commission by its Division 2 then entered the report and order which is the subject matter of this proceeding.

This court stated in its prior decision:

"For many years there has been in effect a joint rate on coal originating on the lines of the L. & N. and N. C. & St. L. [hereinafter sometimes collectively called L. & N.] and the several roads covering the following four routes:

"(1) Louisville & Nashville to Atlanta; Southern to Macon; Georgia Southern to destination.

"(2) Louisville & Nashville to Atlanta; Georgia Railroad to Macon; Georgia Southern to destination.

"(3) Louisville & Nashville to Atlanta; Central of Georgia to Macon; Georgia to destination.

"(4) Louisville & Nashville to Atlanta; Atlantic Coast Line to Cordele; Georgia Southern to destination.

"The Georgia Southern is a subsidiary of the Southern Railway Company and is operated as an integral part of the Southern system. Thus, in each of the above routes, final delivery is made by Southern.

"The Commission made findings to the effect that, from the common gateway, Atlanta, the distances to Warner Robins, Georgia, called by the Commission in its brief here, 'a representative destination' are for the several numbered routes: (1) 104 miles; (2) 219 miles; (3) 119 miles; (4) 220 miles. Each of them requires an interchange of cars at Atlanta, and each of them, except No. (1) requires a second interchange at Macon in routes (2) and (3), and at Cordele in route (4). In the case of No. (4), Coast Line from Atlanta and Georgia Southern to Warner Robins, there is a back-haul of approximately 48 miles."

This prior decision resulted from a review of a finding by

the Commission that the cancellation of the bridge routes would not be consistent with the public interest on the routes designated as (2), (3), and (4) in that they were not unduly circuitous, because shipper testimony favored their continuance, and because the needs of commerce generally and of the national defense required their maintenance. This order was set aside and the case remanded with the observation that Southern had carried the initial burden of proving that the cancellation of routes (2) and (4) was just and reasonable and consistent with the public interest in view of the extent of circuity involved considered in the light of resulting economic loss.

The remand was for the stated reason that there were no basic findings by the Commission by which countervailing considerations which might counteract the prima facie case made by Southern might be measured. The court noted that among other considerations which might properly be weighed for this purpose were the need for competing lines in the particular coal traffic involved, the need for interchanges between the carriers involved for continued efficient transportation of this traffic or in general, the effect on such interchange and on the economic position of the other carriers of the elimination of these joint routes for coal, and the effect of such elimination on the carriers concerned in relation to their ability to furnish adequate service if and when needed for national defense.[2]

The substantial and controlling question now before us is whether the decision of the Commission that cancellation of the routes in issue is just, reasonable, consistent with the public interest, or stated differently, warranted in the law, and supported by adequate findings based on substantial evidence.

We note in the beginning that our function is exhausted

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[2]Consideration of National Defense as an issue was eliminated by counsel for the parties on oral argument.

if we find a rational basis for the conclusions of the Commission. *Mississippi Valley Barge Line Co.* v *United States*, 1934, 292 U.S. 282. We may not substitute our view concerning what should be done for the judgment of the Commission if that judgment has support in the record and the applicable law. *United States* v. *Pierce Auto Freight Lines, Inc.*, 1946, 327 U.S. 515, 536. As this court stated in the prior litigation:

> ". . . Undoubtedly the Interstate Commerce Act charges the Commission with the duty of promoting 'adequate, economical, and efficient service, and of fostering sound economic conditions in transportation.' It is also obvious that some of the requirements may be mutually inconsistent in particular situations. For example a sound economic condition in transportation may require a balance between the wasteful duplication of facilities and services on the one hand and the need for healthy competition on the other. The balancing of these demands is, we think, peculiarly within the jurisdiction of the Commission. Thus, in addition to the usual injunction that the courts must not upset factual determinations of administrative tribunals, if supported by adequate findings of fact based on substantial evidence from the record as a whole, we are here required to recognize that there are also certain quasi policy determinations that are inviolate insofar as they are shown to be made within the framework of the law and on an adequate factual basis."

The Commission concluded on the evidence submitted that cancellation of routes here was consistent with the public interest, and that the schedules effecting the cancellations were just and reasonable. Several findings to support these conclusions were made and each was based on substantial evidence in the record. One of these was that the routes, measured to the principal destination of the coal traffic, were unduly circuitous and resulted in an operation at an unnecessarily higher cost than was the case over the Southern route, the routes in question being more than one

hundred percent longer than the route of the Southern.[3] Another was that an additional interchange is required on these routes either at Macon or Cordele as compared to the route of the Southern. There was contrary evidence and a finding that an interchange between the Louisville and Nashville and Coast Line had been eliminated in Atlanta through yard consolidation and that Coast Line service to Warner Robins was faster than that of Southern. It was held also that there was no showing of any shipper need for the routes. The shipper testimony was either an expression of a desire to have as many competing lines available as possible, or an expression of fear, unsubstantiated, that the daily service of the Georgia Railroad on the Macon branch (Camak to Macon) would be reduced to tri-weekly or even bi-weekly service in the event of loss of this coal traffic. It was found that the loss of this traffic would have no significant effect on the total interchange by Georgia Railroad with the Georgia Southern at Macon. Another supported finding, not rebutted by plaintiffs, was that the coal traffic in question was not profitable to the Coast Line and Georgia Railroad.

We hold that the findings were both appropriate and sufficient in scope, based on substantial evidence from the record as a whole and that the conclusions of justness, reasonableness and consistency with the public interest are warranted in fact and in law.[4]

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[3]The report and order showed that Southern in the years 1955, 1958 and 1959 moved virtually all of the effected traffic except the slightly more than one fourth of the total moving to Warner Robins Air Base which reflected the government policy of distributing traffic among available routes on a somewhat prorata basis. Thus the fight here is over the government coal traffic to Warner Robins, Georgia.

[4]Tested by the admonition of Section 15(3) of the Interstate Commerce Act, 49 USCA Section 15(3), in pertinent part:

> "If any tariff or schedules canceling any through route . . . , without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for

The remaining assignments of error include the contention that there were no findings of fact that the rates or charges as distinguished from the schedules closing the routes were just and reasonable under Sections 1(4) and 1(5) of the Act. 49 USCA 1(4), 1(5). As heretofore noted the Commission proceeded on remand under Sections 15(3) and 15(7) of the Act and the questions before it were whether the route closings were consistent with the public interest, and whether the schedules effecting the cancellations were just and reasonable. This was sufficient. The routes were closed and no question was left as to rates. Southern no longer held itself out as offering through transportation service on coal over these routes. *Thompson* v. *United States*, 1952, 343 U.S. 549, 557. That shipments could continue to move over the same route on local bills of lading at the higher combination rates would not suffice to convert the sum of the routes into through routes.

And on remand it was proper for the Commission to vacate its prior order cancelling the closing of the Coast Line and Georgia Railroad routes by Southern. The status quo did not require continuing the order of cancellation in effect in view of the decision of this court that Southern had established a prima facie case. Plaintiffs tie this action to the denial of their application to the Suspension Board of the Commission to suspend the cancellation and claim prejudice, but prejudice cannot be based on what was lawful action in every respect. We also reject the claim of plaintiffs that the

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investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, . . ."

Section 15(7) of the Act, 49 USCA 15(7) authorizes the Commission to investigate the lawfulness of any new joint rate or point classification, regulation or practice affecting any rate and may order suspension for a period no longer than seven months. The burden of proof as any hearing is on the proponent to show justness and reasonableness.

burden of proof was imposed on them in the proceedings after remand. They were not required to disprove the findings of this court. The burden remained on Southern. We likewise reject the argument that when these contentions are considered together, even if not in and of themselves unlawful, deprivation of due process under the Fifth Amendment is shown.

Plaintiffs make the novel point that Southern discriminates against the Georgia Railroad by accepting traffic from Central of Georgia at Macon on the basis of through route, joint rates in violation of the Section 3(4) of the Act, 49 USCA 3(4). They contend that the point of discrimination is upon delivery in Macon and that to avoid discrimination Southern must perform the same service at the same rate for all cars delivered to Macon by any carrier. To adopt this theory would be to eliminate consideration of the route itself and the factors relating thereto such as circuity and waste from consideration in a route closing case. We are not here concerned with switching or terminal services. Cf., *Louisville & Nashville Railroad Company v. United States*, 1915, 238 U.S. 1. Section 3(4) requires equality of treatment between connecting lines but equality of treatment involves comparable conditions and the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia.

Finding no prejudicial error, and concluding that the findings of the Commission are based on substantial evidence considered on the record as a whole, that they are adequate in form and amply support the legal conclusion that Southern carried its requisite burden in connection with the closing of these routes, the petition to annul and set aside is DENIED.

This — day of April, 1962.

Griffin B. Bell
UNITED STATES CIRCUIT JUDGE

W. A. Bootle
UNITED STATES DISTRICT JUDGE

Lewis R. Morgan
UNITED STATES DISTRICT JUDGE

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 6538[1]

ROUTING, COAL, LOUISVILLE & NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY TO GEORGIA SOUTHERN & FLORIDA RAILWAY

Decided March 19, 1957

1. In I. and S. No. 6538, proposed cancellations of routing in connection with rates on coal from origins on the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway to stations on the Georgia Southern & Florida Railway, found not shown to be just and reasonable. Suspended schedules ordered canceled.

2. In No. 31917, present restrictive routing in connection with rates on coal from origins on the Louisville & Nashville to points on the Georgia Southern & Florida in Florida south of the Jacksonville-Chattahoochee, Fla., line of the Seaboard Air Line Railroad to and including Palatka, Fla., found not shown to be unlawful. Proceedings discontinued.

Henry J. Karison for respondents.

U. B. Ellis, Walter C. Scott, M. T. Hastings, R. B. Gwathmey, Prime F. Osborn III, and *William A. Miller* for protestants.

Roy Carson and *R. J. Janer* for shipper interests in support of protestants.

REPORT OF THE COMMISSION

Division 2, Commissioners Freas, Winchell, and Murphy

By Division 2:

Exceptions to the report proposed by the examiner were

[1]This report embraces also No. 31917, Routing, Coal to Georgia Southern & Florida Stations in Florida.

filed by the protestants, and the respondents replied. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on January 6, 1956, and later, the respondents, Southern Railway Company and Georgia Southern and Florida Railway Company, hereinafter called the Georgia Southern, proposed to eliminate the participation of bridge routes between Atlanta, Ga., and Macon or Cordele, Ga., in connection with the rates on coal from origins on the lines of the Louisville and Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway hereinafter called the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, respectively, to Atlanta, thence the lines of the Central of Georgia Railway Company or the Georgia Rail Road & Banking Company (operated as the Georgia Railroad by lessees: Atlantic Coast Line Railroad Company and Louisville & Nashville) to Macon, or the Atlantic Coast Line Railroad Company, hereinafter called the Coast Line, to Cordele, Ga., thence the Georgia Southern to stations on that carrier on and north of the Jacksonville-Chattahoochee, Fla., line of the Seaboard Air Line Railroad Company, hereinafter called the Seaboard. Upon protest of the Central of Georgia, Georgia Railroad, Coast Line, Louisville & Nashville, and Nashville, Chattanooga & St. Louis, the operation of the proposed schedules was suspended to and including August 5, 1956 and by voluntary action of the respondents the effective date of the schedules was deferred until April 6, 1957.

The respondents made similar cancellations of routes comprising the lines of the same carriers between Atlanta, on the one hand, and Macon and Cordele, on the other, on coal originating on the Louisville & Nashville destined to stations on the Georgia Southern south of the Jacksonville-

Chattahoochee line of the Seaboard to and including Palatka, Fla. Protests were filed against these cancellations, but they became effective on December 30, 1955, in Agent C. A. Spaninger's tariff I. C. C. No. 1332. By order of January 5, 1956, in No. 31917, division 2, upon its own motion, instituted an investigation into and concerning the lawfulness of the present rules, regulations, and practices contained in this tariff, with a view to making such findings and orders in the premises as the facts and circumstances might appear to warrant. The two proceedings were heard on a consolidated record and will be disposed of in one report.

It is proposed to continue the route of the Southern from Atlanta to Macon, thence the Georgia Southern in instances where the latter is the delivering carrier. The routes to common points reached also by the protestant intermediate lines are not affected. The origin territory concerned is in the States of Kentucky and Tennessee, and is divided into coal-mine groups.

At the hearing the respondents stated that through tariff error in Agent Spaninger's I. C. C. No. 1499, the suspended schedules include the elimination of routes in connection with rates from mine groups on the Louisville & Nashville to stations Greggs to Quitman, Ga., inclusive, identified as items 25542-A through 25552-A of the tariff, located on the Perry branch of the Georgia Southern, formerly The South Georgia Railway Company. The Georgia Southern was permitted to acquire control of the South Georgia Railway in *South Georgia Ry. Co. Control,* 290 I. C. C. 281. One of the prescribed conditions under which that control was approved (page 298) is that the Southern and its system lines keep open and unchanged all routes in effect at the time of the filing of the application in that proceeding. It was this condition which moved the respondents to announce at the hearing that the proposed cancellation of the routes to stations Greggs to Quitman would be withdrawn.

The routes from the mines on both originating carriers to Atlanta are direct routes, thus enabling those lines to receive maximum hauls. On coal moving to stations on the Georgia Southern, the originating carriers do not maintain routes via established junctions on the system lines of the Southern other than through Atlanta, although the Louisville & Nashville could interchange coal with that carrier at Knoxville, Tenn., and the Nashville Chattanooga & St. Louis at Chattanooga, Tenn. In addition to the Southern, both originating carriers interchange traffic at Atlanta with the Central of Georgia, the Georgia Railroad, and the Coast Line. The distances from Atlanta to Macon are 88 miles over the Southern, 103 miles over the Central of Georgia, and 203 miles over the Georgia Railroad. To Cordele over the Coast Line from Atlanta the distance is 171.3 miles.

The principal movement of coal in 1955 from these mines over the above routes was to Warner Robins, Ga., where an Air Force base is located. This base is on the Georgia Southern 16 miles south of Macon and 48.5 miles north of Cordele. The respondents compare the short-line distances from Atlanta to Warner Robins, 104 miles, with distances over routes involving the Central of Georgia, the Georgia Railroad, and the Coast Line, 119, 219, and 220 miles, respectively. Using Windrock, Tenn., a point in Louisville & Nashville mine group 1, as representative, the short-line distance therefrom to Atlanta, thence the Southern to Warner Robins, is 335 miles, as compared with 352, 452, and 453 miles, respectively, from the same origin over routes beyond Atlanta of the Central of Georgia, the Georgia Railroad, and the Coast Line, respectively, to the same destination. The latter routes are 5.1, 34.9, and 35.2 per cent longer than the short-line route over the Southern, and do not appear to be unduly circuitous.

A traffic study of coal moved from mines on the Louisville & Nashville and the Nashville, Chattanooga & St. Louis

over these routes to Warner Robins and other stations on the Georgia Southern in 1955, disclosed that 2,030 carloads originated at mines on the Louisville & Nashville, and 12 carloads at mines on the Nashville, Chattanooga & St. Louis. All of the latter shipments moved to Warner Robins, 1 over the Central of Georgia route and 11 over the Georgia Railroad route. Of the 2,030 carloads from mines on the Louisville & Nashville, 524 moved to Warner Robins, of which 219 (41.8 per cent), 114 (21.7 per cent), 117 (22.3 per cent), and 74 (14.2 per cent) moved from Atlanta over the Southern, the Central of Georgia, the Georgia Railroad, and the Coast Line, respectively. Of the remaining 1,506 carloads, 1,485 (98.6 percent), 4 (0.4 percent), 1 (0.07 percent), and 16 (1.06 percent) moved over the Southern, the Central of Georgia, the Georgia Railroad, and the Coast Line, respectively. It thus appears that the great bulk of this traffic, except to Warner Robins, moved over the more direct route of the Southern, and that to Warner Robins somewhat less than half of the shipments moved over that route.

A witness for the Harlan County Coal Operators Association, whose members own mines in Harlan and Bell Counties, Ky., served by the Louisville & Nashville, testified that the bulk of the coal traffic of its members to these stations on the Georgia Southern, other than Warner Robins, moves over the direct route of the Southern from Atlanta through Macon. Because of the mountainous terrain in which these mines are located, the tracks of each are long enough to accommodate only 1 day's supply of empty and loaded cars. These operators are dependent upon a continuous car supply and prefer not to have to rely upon one railroad beyond the originating carrier's junction as a source of empty-car supply. Thus, these mines, being generally served by a single originating carrier, urge that they would be placed at a serious disadvantage in the absence of alternate routes beyond such junction, and would risk possible delays in the delivery of

loaded cars, and the return of empties. A witness for the Penn-Dixie Cement Corporation, located at Clinchfield, Ga., a point midway between Macon and Cordele, and a receiver of large quantities of coal used in the manufacture of cement, stated that in 1955 some 1,400 carloads of coal moved to its plant mainly from mines on the Louisville & Nashville, and mostly over the direct route of the Southern from Atlanta. Both witnesses admitted that the service over the latter route was adequate and satisfactory, but they are opposed to the routing restrictions mainly on the ground that they might be handicapped at times in moving their traffic if dependent upon a single route. They ask that all these routes be continued as a guard against delays caused by landslides, washouts, derailments, strikes, or other contingencies which might interfere with their daily empty-car or coal supply. No one connected with the Air Force base at Warner Robins protested or appeared in opposition to the proposed restrictive routing.

The protestants stress that the routes sought to be canceled have been in effect for many years. The first such routes from mines on the Louisville & Nashville via Atlanta and the Georgia Railroad and the Central of Georgia beyond to Macon, thence the Georgia Southern, became effective in 1905. In 1908, the route in connection with the Atlanta, Birmingham & Coast Railroad, thereafter acquired by the Coast Line, as an intermediate carrier through Cordele, thence the Georgia Southern, was established. The route embracing the Southern did not come into being until March 26, 1918, and then only to common points on the Georgia Southern.

The Coast Line acquired control of the Louisville & Nashville prior to 1914 and the latter obtained control of the Nashville, Chattanooga & St. Louis in 1880. As above stated, the Louisville & Nashville and the Coast Line are the joint lessees of the properties operated by them as the Georgia

Railroad. See *Louisville & N. R. Co. Financial Relations*, 33 I. C. C. 168. In *Restriction in Routing Between Greenwood and Augusta*, 165 I. C. C. 3, at pages 11 and 12, the family-line affiliations between the Coast Line and the Louisville & Nashville, on the one hand, and the Georgia Railroad, on the other, are described as follows:

> The Georgia Railroad is leased from the Georgia Railroad & Banking Company jointly by the Coast Line and the L. & N. The property is operated as a part of the Coast Line-L. & N. system. For convenience of operation a separate organization is maintained by the lessees. The president of the L. & N. and the chairman of the board of directors of the Coast Line are authorized by the two companies to operate the Georgia. This they do by appointing a general manager with authority to maintain an organization for the purpose. It makes separate reports to us, but its profits are included in the tax returns of the lessees, who share any losses from the operation of the property and furnish any money needed for additions and betterments in excess of the earnings.

These protestants indicated at the hearing that their affiliations and operational management are substantially the same at present. They urge that these considerations are important here because of the marginal nature of the operation of the Georgia Railroad over the road's segment of line here concerned and the effect which these route cancellations would have upon the service of the Coast Line through Cordele.

In 1955, the Georgia Railroad interchanged at Macon a total of 2,142 carloads. Of this total, 576 carloads, or 26.9 percent, constituted traffic handled in connection with the Georgia Southern, of which 122 cars or 5.7 percent, contained coal. The Georgia Railroad enters Macon over a branch line diverging from its main line at Camack, Ga., which is called the Macon division. This division is 78 miles in length, and constitutes about 25 percent of the total mileage of the

Georgia Railroad. In 1954, that division contributed 10.66 percent of the total revenue earned by the carrier, and is characterized as a marginal operation. The Georgia Railroad and the Louisville & Nashville maintain joint terminal facilities at Atlanta so as to enable both to handle efficiently and economically traffic interchanged between them. Coal traffic from mines on the Louisville & Nashville destined to points beyond Atlanta was a persuasive factor in projecting those facilities. See *Coal and Coal Briquets in the South*, 289 I. C. C. 341, 362-363.

The Coast Line urges that the elimination of its route from Atlanta through Cordele to destinations on the Georgia Southern on this traffic would increase the cost of maintaining the service and impair its ability to continue to provide such service in the future.

In an effort to justify the longer bridge routes, the Coast Line and the Georgia Railroad contend that because of their family affiliations and unity of purpose with the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, they are entitled to important consideration in the continuation of these routes. They urge that the commercial closing of these routes would neither be in the public interest nor consistent with the national transportation policy. Although there is a family tie between these lines, there is no indication that there is unity of purpose or action from an operational standpoint. The record is clear that the protestant railroads operate independently in representations on the various Southern Freight Association committees, and are entitled to, and actually do, express views separately and independently which sometimes differ. In contrast the Southern system lines operate as a unit in all traffic and other matters, including association procedures.

The protestants rely upon *Cancellation of Routing, Paper Gainesville M. R. Co.* 298 I. C. C. 33, and the report on reconsideration, 299 I. C. C. 107, involving a somewhat simi-

lar situation, which concerned the proposed cancellation by the Southern of routes embracing the line of the Gainesville Midland Railroad Company, and intermediate carrier in the transportation of paper and paper articles from points in southeastern territory to points in trunkline, New England, and other territories. The Commission concluded that the cancellation therein considered had not been shown to be just and reasonable.

As indicated, the Southern handled in 1955 from Atlanta practically all of the traffic here concerned, destined to points on the Georgia Southern, except to the Warner Robins Air Force base, and to that point it handled 41.8 percent, the remaining 59.2 percent having been divided among the 3 protestant bridge lines. As stated, the shipper witnesses indicated that the route of the Southern from Atlanta is satisfactory to them. It is thus reasonably certain that the great bulk of their traffic would continue to move over the Southern if the present routes were continued.

While no representative appeared at the hearing in behalf of the Warner Robins Air Force base, section 6 (8) of the Interstate Commerce Act provides that in time of war or threatened war carriers shall adopt every means within their control to facilitate and expedite military traffic, and in time of peace that deliveries of Government tariffs to agents of the United States shall be made as promptly as possible. Thus, whether in time of war or peace, every reasonable effort must be made to expedite the transportation of traffic consigned to agents of the United States, and this includes traffic to the Air Force base at Warner Robins. Under the national transportation policy, the Commission is charged with the duty of promoting adequate, economical, and efficient service; and of fostering sound economic conditions in transportation and among the several carriers, to the end of developing, coordinating, and preserving a national transportation system adequate to meet the needs of the com-

merce of the United States, of the Postal Service, and of the national defense.

Section 15 (3) of the act provides that in instances where through routes or joint rates are canceled without the consent of all carriers parties thereto or authorization by the Commission, and are suspended for investigation, the burden of proof is upon the carriers proposing the cancellation to show that it is consistent with the public interest, without regard to the short-hauling or other provisions of section 15 (4). The only reason given by the respondents for the proposed restrictive routing is to protect their long haul, to eliminate the bridge lines which they urge involve circuitous and time-consuming transportation, and to channel the traffic to what they believe to be a more efficient and economical route.

As stated, the bridge routes sought to be eliminated are not unduly circuitous, and the shippers testimony before us is in favor of continuing those routes. Considering our duties under the national transportation policy to maintain a transportation system adequate to meet the needs of commerce generally *and of the national defense*, we are not satisfied that the respondents have met the burden resting upon them of showing that the cancellation of the bridge routes proposed would be consistent with the public interest.

The bridge routes, as indicated, are now available on coal at the joint rates points on the Georgia Southern south of the Jacksonville-Chattahooche line. No shipper appeared in favor of or against opening those routes on this traffic, and this record would not support a finding that such routes are necessary or desirable in the public interest.

In I. and S. No. 6538, we find that the proposed cancellation of joint rates and routes is not shown to just and reasonable. In No. 31917, we find that the present restrictive routing is not shown to be unlawful. An appropriate order will be entered requiring cancellation of the schedules under

consideration in the suspension proceeding, and discontinuing both proceedings.

FREAS, *Commissioner*, dissenting in part:

In my opinion respondents have justified cancellation of all the routes involved.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 6538[1]

ROUTING, COAL, LOUISVILLE & NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY TO GEORGIA SOUTHERN & FLORIDA RAILWAY

Decided May 19, 1961

Cancellation of routes in connection with rates on coal from origins on the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway to stations on the Georgia Southern & Florida Railway, found just and reasonable. Findings in prior report, 300 I.C.C. 125, reversed, and proceedings discontinued.

Appearances as shown in prior report and, in addition:

R. Granville Curry for respondents.

C. E. Martin, Clarence Raymond, and *Albert B. Russ, Jr.,* for protestants.

L. R. Steinbach for shipper supporting protestants.

REPORT OF THE COMMISSION ON FURTHER HEARING DIVISION 2, COMMISSIONERS FREAS, GOFF, AND HERRING

BY DIVISION 2:

Exceptions were filed by the protestants to the report on further hearing proposed by the examiner, and the respondents replied. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the prior report in the title proceeding, 300 I.C.C. 125, division 2 ordered the cancellation of certain schedules wherein the Southern Railway Company (the Southern) and its subsidiary, the Georgia Southern and Florida Railway Company (the Georgia Southern), proposed to eliminate

[1]This report embraces also No. 33128, Routing Coal, L. & N. Mines to GS&F (SRS) Stations.

the Central of Georgia Railway Company, the Georgia Railroad,[2] and the Atlantic Coast Line Railway Company (the Coast Line) from participation as intermediate carriers between Atlanta and Macon or Cordele, Ga., in the lowest competitive joint rates[3] on coal moving from mines on the Louisville and Nashville Railroad Company (the Louisville & Nashville) and The Nashville, Chattanooga & St. Louis Railway[4] to local stations in Georgia and Florida on the Georgia Southern on and north of the Jacksonville-Chattahoochee, Fla., line of the Seaboard Air Line Railroad Company. A petition for reconsideration was denied.

In *Southern Ry. Co.* v. *United States*, 167 F. Supp. 747, a statutory three-judge court, holding that with respect to the routes via the Georgia Railroad and the Coast Line the ultimate conclusion was not supported by adequate findings of fact, set aside our order in the title proceeding and remanded the case to us for further proceedings in conformity with the court's opinion. Thereafter, the Georgia Railroad, the Coast Line, and the Louisville & Nashville filed a petition seeking reopening of that proceeding for further hearing. By order of March 23, 1959, the order requiring cancelation of the restrictions, to the extent it covered the routes via the Georgia Railroad and the Coast Line, was vacated and set aside, and, with respect to such routes, the proceeding was reopened for further hearing.

The Southern filed new schedules, effective July 13, 1959, canceling the Georgia Railroad and Coast Line routes, but continuing the route including the Central of Georgia. Upon protest of the Louisville & Nashville, Coast Line, and Georgia Railroad, the investigation in the embraced proceeding

[2] Georgia Rail Road & Banking Company, operated as the Georgia Railroad by the lessees, the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company.

[3] Rates are stated per net ton, unless otherwise indicated.

[4] This company has since been merged into the Louisville & Nashville, *Louisville & N. R. Co. Merger*, 295 I.C.C. 457.

was instituted by order of July 10, 1959, but the schedules became effective as published.

The court held that the Southern had made a prima facie case under section 15(3) that cancellation of the Georgia Railroad and Coast Line routes would be consistent with the public interest by avoiding wasteful transportation, and while recognizing that "countervailing considerations" might exist which it is our duty to weigh, it held that no findings had been made that would overcome the prima facie showing.

From Atlanta, the Southern, extending southeasterly, is the direct rail route to Macon, and from thence Georgia Southern is the direct route to Cordele. The main line of the Georgia Railroad extends eastward from Atlanta to Augusta, Ga., and from Camak, Ga., about 47 miles west of Augusta, a branch line extends southwesterly to Macon. The Coast Line extends from Atlanta indirectly southward to Cordele. From Atlanta to Macon the distance over the Southern is 88 miles, compared with 203 miles over the Georgia Railroad. From Atlanta to Cordele, the distance over the Coast Line is 171.3 miles. To the principal destination of the coal traffic affected by the routing restrictions, Warner Robins, Ga., the location of an Air Force base, the distances from Atlanta over the specified routes are as follows: Southern and Georgia Southern, 104 miles; Georgia Railroad, Macon, and Georgia Southern, 219 miles; and Coast Line, Cordele, Georgia Southern, 220 miles. The latter route requires a northerly movement of 48.5 miles in the nature of a backhaul.

In the prior report, the results of a traffic study for the year 1955 showed that the great bulk of the affected traffic, except to Warner Robins, moved over the direct route of the shipments so moved. In 1958, as in 1955, the principal movement was to Warner Robins. The following table shows the number of carloads moved to Warner Robins and to other destinations over the Southern, and over the routes including

the Georgia Railroad and the Coast Line, respectively, for 1955, 1958, and until July 13, 1959:

Routes over—	Number of carloads to—	
	Warner Robins, Ga.	Other destinations
Southern:		
1955	219	1,485
1958	155	674
1959 (to July 13)	26	457
Georgia Railroad:		
1955	117	1
1958	154	10
1959 (to July 13)	15	14
Coast Line:		
1955	74	16
1958	159	0
1959 (to July 13)	15	0

As above indicated, shipments over the Georgia Railroad and the Coast Line routes to points other than the Warner Robins were few, and most were to common points. To such common points, including Cordele, Tifton, Sparks, Valdosta, and Haylow, Ga., traffic can be moved at the lowest tariff rate over routes in which the Southern would not participate. Including shipments to Warner Robins, the total over each of the bridge routes averaged less than 1 car a day; for example, in 1958 the 154 carloads to Warner Robins and the 10 cars to other points, or 164 cars, over the Georgia Railroad, amounted to slightly over 3 cars a week. In 1958 no cars moved over the Coast Line to destinations other than Warner Robins, and only 159 cars moved to Warner Robins, an average of only 3 cars per week.

The large number of carloads over the bridge routes to Warner Robins reflects the Government policy of distributing traffic among the available routes. Sustantially the same number of cars moved to Warner Robins over each of the

routes in 1958, although in 1955 the Georgia Railroad handled only 22.3 percent and the Coast Line 14.2 percent of the total carloads delivered. After those routes were closed on July 13, 1959, the Air Force distributed the traffic almost equally between the 2 remaining routes, 78 carloads having moved over the Southern and 73 over the Central of Georgia to September 1959.

The 164 carloads which the Georgia Railroad handled during 1958 earned average revenue of $69.17 per car, compared with an average of $54.90 for all traffic in the same year. On the Coast Line, the traffic produced average revenue of $65.36, which is greater than the average revenue on sand and gravel or crushed stone, and compares favorably with the average revenue on pulpwood. The 74 cars of coal interchanged by the Coast Line to the Georgia Southern in 1955, destined to Warner Robins, represented 19.47 percent of all deliveries to the Georgia Southern at Cordele; in 1958, the 159 carloads were 42.8 percent of such deliveries. Overhead traffic on the Georgia Railroad was 42.53 percent of the total handled in 1955, and 43.71 percent in 1958. If the routes remain closed, it is estimated that the net revenue loss to the Georgia Railroad will be $5,418 annually, and to the Coast Line $4,854, compared with total annual revenues of $7,903,969 and $149,588,619, respectively.

Since the last hearing in 1956, the Coast Line and the Louisville & Nashville consolidated their freight yards at Atlanta. The effective date, December 1, 1959, was the last day of the further hearing, and no operating results were available. However, it appears that the consolidation will eliminate one interchange, and will enable this traffic to leave Atlanta on an earlier train, thus reducing the scheduled time in transit to Warner Robins over the Coast Line and the Georgia Southern by 25.5 hours. Although the scheduled arrival at Warner Robins would precede the scheduled arrival of carloads over the Southern's route on the same day,

all such carloads would be switched at the same time. The return of empty coal cars to Atlanta would be faster over the direct Southern route. As previously mentioned, the 48.5-mile movement from Cordele to Warner Robins is a back-haul and the total distance from Atlanta over the Coast Line route is more than twice that over the Southern's route.

At the further hearing, neither of the two shipper interests which had participated at the original hearing appeared. As set forth in the prior report, a witness for a coal operators' association and a witness for a cement manufacturer located between Macon and Cordele stated that they preferred to have all routes kept open as assurance against failures of empty-car supply and delays caused by right-of-way emergencies. Except for coal shipped by the operators to Warner Robins, most of the traffic represented by those interests moves over the dirrect Southern route, and the service has been adequate and satisfactory.

The only shipper represented at the further hearing, a paper manufacturer at Mead, Ga. (between Macon and Warner Robins), served by the Georgia Southern and the Central of Georgia, expressed a desire for continuance of the routes in question, particularly that in connection with the Georgia Railroad. The shipper fears that the closing of the route might affect service over the Georgia Railroad in the movement of pulpwood to, and paper products from, the plant at Mead. Prior to a restriction of routes in connection with paper and pulpboard traffic, that carrier operated two trains daily, while at present there is only one. During an 8-month period in 1959, one-third of the 168,000 cords of pulpwood consumed at the Mead plant originated on the Georgia Railroad. The shipper operates six woodyards on that carrier's lines, three of which are on the Macon branch. The routing of finished paper products is related to inbound pulpwood tonnage, but owing to routing limitations the shipper has been unable to accord the Georgia Railroad the out-

bound volume proportionate to inbound traffic; in the 8-month period it was less than half. Apparently only one shipment of coal moved to the Mead plant over that route.

Over the Southern, between Atlanta and Macon, the traffic moves in heavy through trains. One scheduled train in September and October 1959, was composed of an average of 152 cars per trip, of which 136 were loaded, and the average total weight was 7,092 gross tons. Another train in the same period had an average weight of 8,394 gross tons. In contrast, one Coast Line train averaged only 4,287 gross tons, and another 2,868 gross tons.

In the prior report it was stated that the Southern and the Georgia Southern operate as a unit in all traffic and other matters. The Southern, in the period 1940 through 1958, made gross capital expenditures of $266,026,984 for road property over its entire system, including 67 improvements between Atlanta and Jacksonville from 1951 to 1959 at a total cost of $21,065,946, $17,000,000 of which was spent for a modern freight yard at Atlanta.

Over the Georgia Railroad the traffic has been handled in through trains from Atlanta to Camak, and by a local train to Macon for approximately 78 miles. In 1956, two round trips a day operated between Camak and Macon, but in December 1957, before the closing of its route on coal in July 1959, it eliminated one round trip. Although a witness stated that the loss of the coal traffic might result in a further reduction to three round trips a week, it does not appear how the loss of traffic averaging barely three cars a week would compel such curtailment. Total adjusted income on the Macon branch was $28,653 in 1958, compared with deficits of $49,618.15 in 1957 and $1,996.81 in 1956. Traffic interchanged with the Georgia Southern at Macon in 1957 accounted for 32.1 percent of the total revenue obtained by the Georgia Railroad from all traffic interchanged at Macon. For the first 8 months of 1958, the percentage was about the

same, but a heavy movement of crushed stone during the following months of 1958 and 1959 resulted in considerably higher percentages. No separate showing was made as to the effect of the coal interchange, but an annual total of 164 cars would not appear to have any significant effect on the total interchange at Macon.

Carrier	Revenue		Operating expenses
	All traffic	Coal	
	Cents	*Cents*	*Cents*
Georgia Railroad	45.8	34.1	39.1
Coast Line	50.0	37.4	37.9
Southern	52.2	69.9	33.6

The table indicates that the operating expense, which excludes payroll and other taxes, equipment and joint-facility rents, and return on investment, exceeds the revenue derived from the coal traffic here considered by both the Georgia Railroad and the Coast Line routes, the reverse obtaining in the case of the Southern. Admittedly, the data have the deficiencies of system averages, but the indicated nonprofitability of the traffic to the protestants is not rebutted by better evidence.

It is urged by the protestants that the routes in question are not unduly circuitous, referring in that connection to certain standards we applied formerly[5] in considering applications for relief from the long-and-short-haul clause of section 4 of the act, to avoid wasteful transportation. Where the direct route was between 150 and 1,000 miles in length, relief over circuitous routes was limited generally to those not more than 50 percent longer. Considering the entire distances from Windrock, Tenn., group of mines on the Louisville & Nashville to Warner Robins, as set forth in the prior report,

[5]When we had jurisdiction to consider relief over circuitous routes; since July 11, 1957, jurisdiction in that respect has been limited to direct routes.

the routes here concerned are about 35 percent longer than the Southern's direct route. The question here, however, is whether cancellation of those routes (in connection with the lowest joint rates) is consistent with the public interest under section 15(3). As pointed out, from Atlanta the routes in dispute to Warner Robins are more than 100 percent longer than the route of the Southern. As the court stated in its opinion:

> It is not fruitful to belabor the question whether the percentage of circuity of the bridge routes is to be determined by taking the straight line (Southern route) distance between the gateway at Atlanta to destination or by taking into consideration the added distance over the L. & N. before the coal is delivered to one or the other of the indicated routes. It stands without possibility of contradiction that as two of the bridge routes * * * [via the Georgia Railroad and the Coast Line], the distance from the interchange at Atlanta to the selected destination is more than twice as long as the shortest route— * * *.

The protestants argue that the higher combination rates now applicable over the routes in question are in violation of section 1(4) of the act, which makes it the duty of every railroad to establish reasonable through routes and just and reasonable rates applicable thereto, and that the failure of the Georgia Southern to accept traffic from the Georgia Railroad at Macon while accepting it from the Central of Georgia at the same junction, and the restriction against the protestants at Atlanta but not against the Central of Georgia, amount to discrimination against connecting lines contrary to section 3(4) of the act. The issue here is whether the cancellation of routes is consistent with the public interest. Section 3(4) requires equality of treatment between connecting lines, but equality of treatment is determined by similarity of circumstances and conditions. *Quanah, A & P. Ry. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 211 I.C.C. 389, See also *Denver & R.G.W.R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 658. As indicated in the prior report, the distance from Atlanta to Warner Robins over the Central of Georgia is only about 15

miles longer than over the Southern's direct route, in contrast with 115 and 116 miles longer over the Georgia Railroad and the Coast Line, respectively, a fact which negatives any conclusion that the transportation conditions are similar.

In addition to the undue circuity of the Georgia Railroad and Coast Line routes as compared with the direct Southern route, an additional interchange is required at Macon or Cordele. As previously observed, the traffic moving over those indirect routes to Georgia Southern local points has been relatively insignificant in terms both of volume and of revenue. Considering all the evidence of record, we conclude that the cancellation of the routes here in question is consistent with the public interest.

On further hearing in the title proceeding, and in the embraced proceeding, we find that the schedules under investigation are just and reasonable. An order will be entered discontinuing the proceedings.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 19th day of March, A.D. 1957

INVESTIGATION AND SUSPENSION DOCKET NO. 6538

ROUTING — COAL — LOUISVILLE & NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY TO GEORGIA SOUTHERN & FLORIDA RAILWAY

No. 31917

ROUTING — COAL TO GEORGIA SOUTHERN & FLORIDA RAILWAY STATIONS IN FLORIDA

It appearing, That by order dated January 5, 1956, in I. & S. No. 6358, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules designated in said order, and suspended the operation of the schedules to and including November 6, 1956, and that the respondents voluntarily postponed the effectiveness of said schedules to and including April 5, 1957:

It further appearing, That by order dated January 5, 1956, in No. 31917, the Commission instituted an investigation, upon it own motion, concerning the lawfulness of the rules, regulations, and practices contained in certain schedules designated in said order, with a view to making such findings and orders in the premises as the facts and circumstances might appear to warrant;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that said division, on the date hereof, has made

and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules under investigation in I. & S. No. 6538, on or before April 26, 1957, upon not less than one day's notice to the Commission and the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that these proceedings be, and they are hereby, discontinued.

By the Commission, division 2.

HAROLD D. McCOY,

Secretary.

(SEAL)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 23rd day of March, A.D., 1959.

INVESTIGATION AND SUSPENSION DOCKET NO. 6538

ROUTING — COAL — LOUISVILLE & NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY TO GEORGIA SOUTHERN & FLORIDA RAILWAY

It appearing, That in Civil Action No. 1462, in *Southern Railway Campany and Georgia Southern and Florida Railway Company* v. *United States of America and Interstate Commerce Commission*, the United States District Court for the Middle District of Georgia, on September 24, 1958, filed

its decision dated September 22, 1958, setting aside the Commission's order entered March 19, 1957, in this proceeding, and remanding the matter to the Commission for further proceedings in conformity with its opinion;

Pursuant to the court's decision, and upon consideration of a petition filed on December 11, 1958, by certain of the protestants, viz: Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Georgia Rail Road & Banking Company (operated as Georgia Railroad by lessees Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company) for reopening the proceeding for further hearing or, in the alternative, oral argument before the entire Commission, and reply to the petition by respondents; and good cause appearing:

It is ordered, That the order entered in this proceeding on March 19, 1957, requiring the respondents to cancel the schedules under suspension in I. & S. No. 6538, upon not less than one day's notice to the Commission and to the general public, which order pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of respondents' petition, reinstated and modified by order entered in this proceeding on August 23, 1957, so as to require respondents to cancel such schedules on or before October 5, 1957, on not less than one day's notice, is further modified and amended by vacating and setting aside the requirements that respondents cancel the proposed cancelation of routes embracing the Atlantic Coast Line Railroad Company, and the Georgia Rail Road & Banking Company (operated as Georgia Railroad by lessee Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company) beyond Atlanta, Ga., pending decision of the Commission on further hearing in the proceeding, and that said order, of March 19, 1957, as modified and amended insofar as it affected the proposed cancelation of route over the Central

of Georgia Railway Company beyond Atlanta continues in force and effect.

And it is further ordered, That the petition whereby protestants seek the reopening of the proceeding for further hearing be, and it is hereby, granted, insofar as the order of March 19, 1957, concerns routes embracing the Atlantic Coast Line Railroad and the Georgia Railroad beyond Atlanta.

By the Commission, Division 2.

HAROLD R. McCOY

Secretary

(SEAL)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C. on the 19th day of May, A.D. 1961.

INVESTIGATION AND SUSPENSION DOCKET NO. 6538

ROUTING COAL LOUISVILLE & NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY TO GEORGIA SOUTHERN & FLORIDA RAILWAY

No. 33128

ROUTING COAL L. & N. MINES TO GS&F (SRS) STATIONS

It appearing, That on March 19, 1957, division 2 filed its report, 300 I.C.C. 125, and entered its order in I. & S. No. 6538; that subsequently a petition for reconsideration was denied; and that thereafter, on September 22, 1958,

the United States District Court for the Middle District of Georgia filed its decision in *Southern Railway Co.* v. *United States*, 167 F. Supp. 747, setting aside the said order of March 19, 1957, and remanding the matter to this Commission for further proceedings in conformity with its opinion;

It further appearing, That in consideration of the court's decision and petitions of certain protestants seeking further hearing, by order entered March 23, 1959, further hearing was granted and the order of March 19, 1957 was modified by vacating and setting aside the requirement that the respondents cancel the proposed restriction of routes embracing the Atlantic Coast Line Railroad Company and the Georgia Railroad, pending the decision on further hearing;

It further appearing, That No. 33128, by order entered on July 10, 1959, an investigation was instituted into and concerning the lawfulness of certain schedules enumerated therein;

And it further appearing, That a hearing has been held, and that a full investigation of the matters and things involved in said proceedings has been made, and that the division, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report and the prior report in I. & S. No. 6538, are hereby referred to and made a part hereof:

Is is ordered, That these proceedings be, and they are hereby, discontinued.

By the Commission, division 2.

HAROLD D. McCOY,

Secretary.

(SEAL)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington D. C., on the 13th day of September, A.D. 1961.

INVESTIGATION AND SUSPENSION DOCKET NO. 6538

ROUTING COAL LOUISVILLE & NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY TO GEORGIA SOUTHERN & FLORIDA RAILWAY

No. 33128

ROUTING COAL L. & N. MINES TO GS&F (SRS) STATIONS

Upon consideration of the record in the above-entitled proceedings and petition of protestants, Atlantic Coast Line Railroad Company, Georgia Railroad Company, and Louisville & Nashville Railroad Company, for reopening and reconsideration of the report on further hearing and order of Division 2, decided May 19, 1961, and for oral argument, filed June 28, 1961, and reply thereto by respondents, filed July 18, 1961:

It is ordered, That the petition for reconsideration and oral argument be, and it is hereby, denied, for the reason that the matters submitted in support thereof do not constitute substantial and material grounds to warrant granting the action sought.

By the Commission.

HAROLD D. McCOY,

Secretary.

(SEAL)

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY
(49 U.S.C. preceding § 1)

[49 U.S.C. preceding §§ 1, 301, 901, and 1001]. It is hereby declared to be the national transportation policy of the Congress **to provide for fair and impartial regulation** of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; **to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices;** to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, co-ordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. **All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.**

TITLE 49 U.S.C.

SEC. 1—REGULATION IN GENERAL; CAR SERVICE; ALTERATION OF LINE

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reason-

able rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. **It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto;** and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) **All charges made for any service rendered or to be rendered** in the transportation of passengers or property, or in connection therewith, **shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.**

SEC. 3—PREFERENCES; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

(4) **All carriers subject to the provisions of this part shall,** according to their respective powers, **afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper.** As used in this paragraph the term "connecting

line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 15—DETERMINATION OF RATES, ROUTES, ETC.; ROUTING OF TRAFFIC DISCLOSURES, ETC.

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. **If any tariff or schedule canceling any through route or joint rate, fare, charge or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.**

(7) **Whenever there shall be filed with the Commission any schedule stating a new** individual or joint rate, fare, or charge, or any new individual or joint classification,

or any new individual or joint **regulation or practice affecting any rate,** fare, or charge, **the Commission shall have, and it is hereby given, authority,** either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, **to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice;** and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed charge or rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the person in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, **the burden of proof shall be upon the carrier to show that the proposed charged rate,** fare, charge classification, rule, regulation, or practice **is just and reasonable,** and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

ADMINISTRATIVE PROCEDURE ACT
TITLE 5 U. S. CODE
SEC. 7—HEARINGS

(c) EVIDENCE. — **Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof.** Any oral matter of policy for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

SEC. 8—DECISIONS

In cases in which a hearing is required to be conducted in conformity with section 7—

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. **All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record: and (2) the appropriate rule, order, sanction, relief, or denial thereof.**

SEC. 10—JUDICIAL REVIEW

Except as far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW. — **Any person suffering legal wrong because of any ageny action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.**

(c) REVIEWABLE ACTS. — **Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to re-**

view upon the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(e) SCOPE OF REVIEW.—**So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall** (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) **hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.**

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No. 247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Georgia

MOTION OF APPELLEE CARRIERS TO AFFIRM

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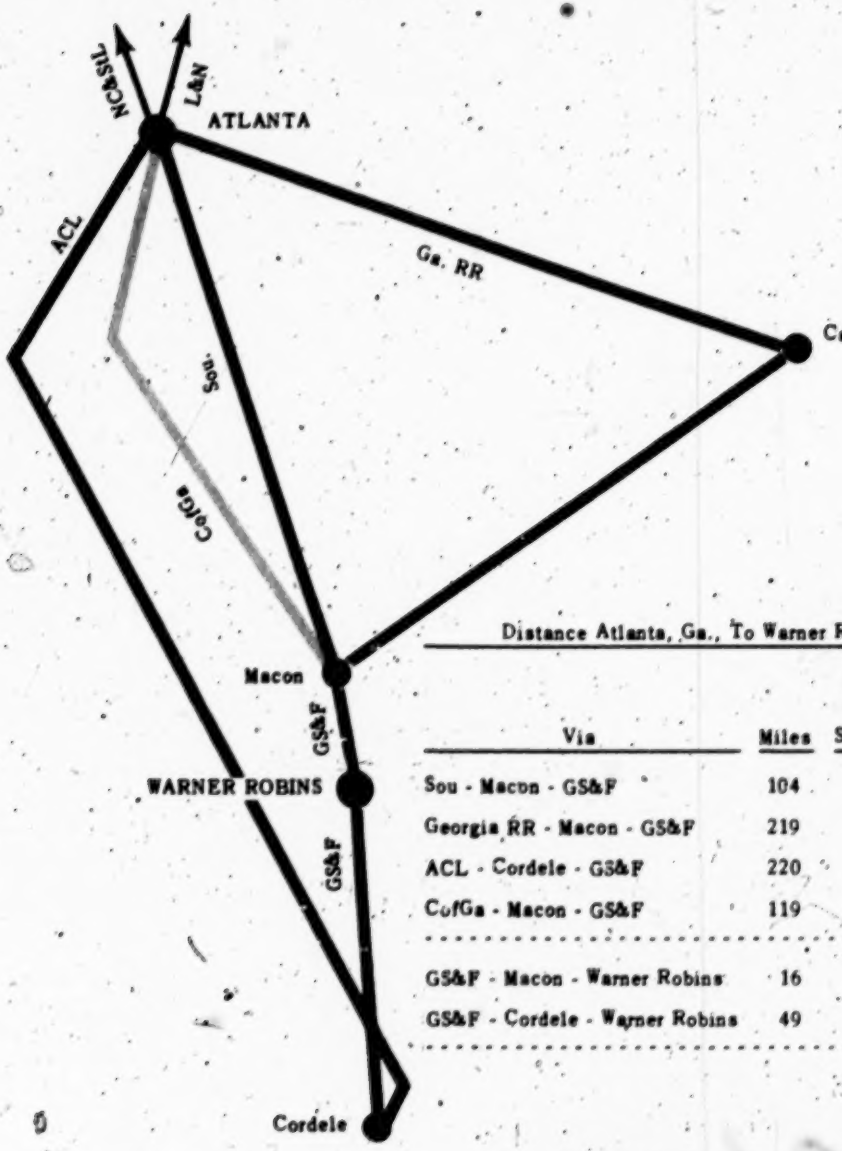

Distance Atlanta, Ga., To Warner Robins, Ga.

Via	Miles	Excess Over Sou-GS&F	Perce Of Circui
Sou - Macon - GS&F	104	-	-
Georgia RR - Macon - GS&F	219	115	110.6
ACL - Cordele - GS&F	220	116	111.5
CofGa - Macon - GS&F	119	15	14.4
GS&F - Macon - Warner Robins	16	-	-
GS&F - Cordele - Warner Robins	49	-	-

Southern-Georgia Sou. & Fla.
Georgia Railroad
Atlantic Coast Line
Central of Georgia

Source: Ex. No. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 247

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Georgia

---

MOTION OF APPELLEE CARRIERS TO AFFIRM

Pursuant to rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees Southern Railway Company and Georgia Southern and Florida Railway Company move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered April 18, 1962, by a three-judge District Court convened under 28 U.S.C. 2284 and 2325, dismissing

appellants' complaint seeking to set aside an order of the Interstate Commerce Commission (by Division 2) entered on May 19, 1961, in *Routing, Coal from Origins on Louisville & N. R.*, 313 I.C.C. 752, which was affirmed by the entire Commission by order of May 19, 1961, denying petition for reconsideration. The jurisdictional statement was served on appellees on July 14, 1962.

QUESTIONS PRESENTED

The basic misconception and misunderstanding by appellants is in respect to the real issue in this case which, as the Commission pointed out, is "whether the *cancellation of routes* is consistent with the public interest" under section 15(3) of the Interstate Commerce Act. (313 I.C.C., p. 758) (Emphasis supplied) They endeavor to give the utterly unsupported impression that the cancellation involved is not of through routes but of joint rates, leaving through routes still in effect.

In the light of the argument made in the jurisdictional statement of appellants, the following questions are believed to be the ones here involved and that the correct answer to them shows that appellants' contentions are completely lacking in substance.

1. Was the Commission justified by the record in finding that there is "undue circuity" of the longer through routes including Georgia Railroad and Atlantic Coast Line Railroad (A.C.L.) between the points involved, as compared with the direct route including the Southern Railway Company and its wholly-owned subsidiary Georgia Southern and Florida Railway Company (G.S.&F.); that traffic "over those indirect routes" has been "relatively insignificant in terms both

of volume and of revenue"; that upon "all the evidence of record" the "cancellation of the routes here in question is consistent with the public interest"; and that "schedules under investigation" providing for such cancellation are "just and reasonable"?

2. Was it error for the Commission to treat as irrelevant and immaterial the question of reasonableness of alleged combinations of rates over such circuitous lines, when the through routes were found to have been properly cancelled, and there were thus no through routes for the movement of through traffic whether or not under combination rates?

3. Was the Commission justified in finding that there was no unlawful discrimination under section 3(4) of the Interstate Commerce Act?

4. Was there procedural error by the Commission in permitting, pending decision on further hearing, Southern to cancel the through routes including the Georgia R.R. and A. C. L. routes following the Court decision setting aside the Commission's first report and order finding that such cancellation had not been justified?

HISTORY OF THE CASE

This case involves the validity of a decision and order by the Commission (313 I.C.C. 752, J. S., p. 34) with respect to the elimination of wasteful and unnecessary bridge routes for the movement of coal from mines on the Louisville & Nashville Railroad Company (L. & N.) and on its subsidiary, Nashville, Chattanooga & St. Louis Railroad Company (N. C. & St. L.) later merged into it, to destinations on the G. S. & F., a part of the Southern System, the two roads last named being generally referred to herein as the Southern.

The coal traffic moved over the L. & N. and N. C. & St. L. from mines to Atlanta, Ga., and thence to destinations beyond, the principal destination being Warner Robins, Ga. The four routes and distances beyond Atlanta to Warner Robins are shown in the *chart* at the beginning of this motion and are as follows:

Route	Distance Beyond Atlanta (Miles)
1. L. & N. to Atlanta, Southern Railway to Macon, Ga., G. S. & F. (its subsidiary) to destination	104
2. L. & N. to Atlanta, Georgia R. R. to Macon, G. S. & F. to destination	219
3. L. & N. to Atlanta, A. C. L. to Cordele, Ga., G. S. & F. to destination	220
[1] 4. L. & N. to Atlanta, Central of Georgia (C. of Ga.) to Macon, G. S. & F. to destination	119

In each of the routes, Southern (which as noted includes the G. S. & F. as an integral part of its system) is the delivering line. Thus the Georgia R.R., the A. C. L., and the C. of Ga. are segments between the L. & N. at Atlanta and the Southern System as the terminating line. The routes are, therefore, referred to as bridge routes. It can be seen that the Georgia R.R. bridge route and the A. C. L. bridge route are each more than 100 miles longer, or more than twice as long as, the route over Southern beyond Atlanta.

The case before the Commission arose by reason of the suspension by the Commission of certain tariffs of Southern providing for the cancellation of the circuitous routes just described, including the Georgia R.R. and A. C. L. bridge routes. By its original tariffs filed to become effective December 26, 1955 and January 6,

[1] As later indicated the C. of Ga. bridge route is not here in issue, not having been cancelled.

1956, Southern provided for routes from the L. & N. mines and the N. C. & St. L. (now L. & N.) mines to points on the G. S. & F. but limited only to the Southern direct route beyond Atlanta. This was accomplished by omitting reference to routes previously published to include the Georgia Railroad, the A. C. L. and the C. of Ga. Exhibits 3 and 4 showed the then-existing "Present routes" and "Proposed routes" to the destination points involved and the word "Cancel" as to each of the routes except the route via Southern. Also the tariff in each instance provided that "routes formerly shown and not brought forward are hereby cancelled".[2]

These schedules proposing to eliminate the bridge routes of the Georgia R.R., the A. C. L., and the C. of Ga., were suspended by the Commission prior to their effective dates in Investigation and Suspension docket No. 6538.

After a hearing, the examiner who heard the case concluded that the proposed schedules had been justified. However, on exceptions and replies, Division 2 of the Commission, on March 19, 1957, concluded (309 I.C.C. at p. 131; J. S. App. p. 32) that "we are not satisfied that the respondents [Southern] have met the burden resting upon them of showing that the *cancellation of the bridge routes* proposed would be consistent with the public interest" and that "the proposed cancellation of *joint rates and routes* is not shown to be just and reasonable". Commissioner Freas, dissenting, stated that in his opinion "respondents have justified

[2] See Note C3 in supplement 6, page 3, to S.F.T.B. tariff I.C.C. 1429 (Ex. 34) and Note C6 in supplement 18, pages 2 and 3 to S.F.T.B. tariff I.C.C. 1427 (Ex. 33).

cancellation of all the routes involved". (Emphasis supplied) Petition for reconsideration was later denied.

Thereafter, Southern filed its complaint in the United States District Court for the Middle District of Georgia seeking to set aside the Commission's decision and order. The court, by its decision of September 22, 1958, concluded "that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden of showing that the *elimination of routes* (2) and (4) is consistent with the public interest" and that the order of the Commission "is set aside and the case is remanded to the Commission for further proceedings in conformity with this opinion". (Emphasis supplied) *Southern Railway Company* v. *United States*, 167 F. Supp. 747, 755. The court had previously pointed out that there were various considerations which the Commission "might properly weigh to counteract the prima facie case made by the plaintiff" and that the burden of proof rested with the plaintiffs. No appeal was taken from the decision of the Court. (id. p. 754).

Following the Court's decision, the protestant carriers filed a petition seeking to have the case reopened and a further hearing held. This petition was granted by order of March 23, 1959 but only as to "routes embracing the Atlantic Coast Line Railroad and the Georgia Railroad beyond Atlanta", the C. of Ga. bridge route being excluded (J. S. App. p. 47). No objection was made to such exclusion.

In the same order (March 23, 1959) the Commission modified its previous order which had required cancellation of the routes in question "by vacating and setting aside the requirements that respondents cancel the

proposed cancellation of routes embracing" the A. C. L. and Georgia R.R., "pending decision of the Commission on further hearing in the proceeding", but no modification was made as to "the proposed cancellation of route over the Central of Georgia Railway Company beyond Atlanta" (J. S. App. pp. 46, 47).

Thereafter, by tariffs filed with the Commission to become effective July 13, 1959, Southern cancelled the Georgia R.R. route and the A. C. L. route. Exhibit 46 showed the existing routes on July 12, 1959, via these two protestant lines and that "effective July 13, 1959", "no change" was made as to the route via the Southern but as to the Georgia R.R. and A. C. L. routes the requirement was "Cancel".[3] Thus it was made plain that routes previously in effect via the Georgia R.R. and the A. C. L. were cancelled and eliminated. The tariffs themselves contain a note that routes not brought forward "are hereby cancelled".[4]

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[3] The exhibit lists the tariffs showing these facts, namely, SFTB I.C.C. S-62 and Supplement 82 to I.C.C. 1499 as to traffic from L. & N. mines and SFTB I.C.C. S-62 and Supplement 78 to I.C.C. 1427 as to traffic from L. & N. (N. C. & St. L.) mines (R. 247, 248).

[4] The explanatory note, for example, in Supplement 82, page 4, reads:

> "Routes formerly shown and not brought forward herein, are hereby cancelled. Note 1—This has the effect of establishing matter which was suspended by order of the Interstate Commerce Commission in I&S Docket 6538, voluntarily postponed and cancelled pursuant to order in that proceeding dated August 23, 1957, which order was vacated by order dated March 23, 1959, the 7 months period of suspension having expired August 5, 1956."

Appellants in a remarkable emotional outburst (J. S. pp. 19, 20), itself indicative of weakness, seek to criticize Southern for presenting the actual tariffs in court, although appellants con-

The Commission declined to suspend the new tariffs providing for cancellation of the Georgia R.R. and A. C. L. routes but in docket No. 33128 entered an order on July 10, 1959, instituting an investigation concerning the lawfulness of the tariff schedules involved (J. S. App. p. 48).

Since the schedules were not suspended, they became effective on July 13, 1959, and since then the A. C. L. and Georgia R.R. *routes* have been cancelled.

A further hearing was held in the two dockets on November 30 and December 1, 1959, before a hearing examiner who recommended that cancellation of the two bridge routes here in question (via the A. C. L. and via the Georgia R.R.) should be found to be justified.

Thereafter, Division 2 of the Commission by its report and order of May 19, 1961, here under attack (313 I.C.C. 752, J. S. App. p. 34), found and concluded that "the cancellation of the *routes* here in question is consistent with the public interest" and that the schedules under investigation are "just and reasonable". (Emphasis supplied) The order discontinued the proceedings. A petition for reconsideration by the entire Commission was filed by the protestants but was denied by order of September 13, 1961. Thereafter, the appellant carriers filed a suit in the same court to set aside

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seuted thereto and even though they must be presumed to know these tariffs, having relied upon them in Exhibit 46, and must know that tariffs, when suspended or investigated, are not introduced in evidence before the Commission, but are matters of official and judicial notice. Appellants' excitement may stem from the fact that the tariffs themselves are further confirmatory of the testimony and exhibits puncturing appellants' erroneous theory that the tariffs cancelled *joint rates* and not *through routes*, and thus left through routes in effect.

the Commission's report and order of May 19, 1961, and the order of September 13, 1961, denying the petition for reconsideration.

This was a separate suit and was not a continuation of the original case brought before the Court. After briefs and oral argument, and consideration of contentions of all the parties, the Court upheld the Commission's report and order. It concluded, among other things, that the findings of the Commission "that *cancellation of routes* here was consistent with the public interest, and that the schedules effecting the cancellations were just and reasonable" were "based on substantial evidence from the record as a whole and that the conclusions of justness, reasonableness and consistency with the public interest are warranted in fact and in law" (J. S. App. pp. 18, 19). (Emphasis supplied) The Court further held with respect to appellants' contentions concerning the question of reasonableness of rates under section 15(7) of the act that the "routes were closed and no question was left as to rates. Southern no longer held itself out as offering through transportation service on coal over these routes" (id. p. 20).

The Court further held that "on remand it was proper for the Commission to vacate its prior order cancelling the closing of the Coast Line and Georgia Railroad routes by Southern" and that "the status quo did not require continuing the order of cancellation in effect in view of the decision of that court that Southern had established a prima facie case" (id. p. 20). The Court also held that unlawful discrimination under section 3(4) of the act had not been shown and that the Commission was fully warranted in reaching its conclusion (id. p. 21).

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The history of the case, it is believed, shows that appellants have had full opportunity to be heard, that their contentions have been carefully considered and found to be without merit, and that the Commission's decision here involved is clearly valid.[5]

THE QUESTIONS RAISED BY APPELLANTS ARE WITHOUT SUBSTANCE

Rule 16 of the rules of this Court provides for receiving "a motion to affirm the judgment" of a lower court "on the grounds that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument".

Appellees believe that the questions raised by appellants do not involve broad and important rulings of law but in substance merely whether the Commission has properly exercised its discretion on the basis of necessary findings and on substantial evidence; that appellants' contentions are wholly lacking in merit, and that there is such utter lack of substantiality in the questions raised by them that no need for further argument is shown to exist.

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[5] It is to be noted that cancellation of routes proposed by Southern and later effected has been found proper by two hearing examiners, by Division 2 of the Commission, by the Commission itself on petition for reconsideration, and by unanimous decisions of two three-judge courts, with five different judges (Judges Tuttle, Davis and Bootle, on the first Court, and Judges Bell, Bootle and Morgan, on the second).

1. The Commission's Findings That "The Cancellation of the Routes Here in Question Is Consistent With the Public Interest" and That the Schedules Providing for Such Cancellation Are "Just and Reasonable" Are Clearly Supported by the Record and Are Valid

From the very beginning of this case it was made manifest that the "cancellation of routes" was the real issue. The first witness to testify at the first hearing showed that Investigation and Suspension Docket No. 6538 "involves the *elimination* of so-called 'bridge routes' in connection with rates on coal from origins on the L&N and the NC&StL to stations on the GS&F", that the routes to be *eliminated* are those including the Georgia R.R. and the A. C. L., and that "it is proposed to continue the route of the Southern Railway Company" and the G. S. & F. beyond Atlanta "as this is a single system line route" (Witness Goodman, R. 8, 9; emphasis supplied). Further indicating that the purpose was to eliminate the routes as distinguished from merely cancelling rates, he pointed out Southern's interest in doing what it could to reduce expenses and improve efficiency and that "the so-called 'bridge routes' were eliminated so that this coal traffic would be channeled via the most direct, economical and efficient route", namely, the Southern route, as contrasted with the indirect and circuitous routes sought to be eliminated (R. 10, 11).

Finding of "undue circuity" over cancelled routes. Appellants seek to find fault with the Commission's finding of "undue circuity" (which is tantamount to a finding of wastefulness) of the routes including the Georgia R.R. and the A. C. L., and unjustly assert that "the Commission merely quoted the comments of the Court [its decision in 167 F. Supp. 747] on the circuity aspect of the public interest issue * * *" (J. S. p. 30).

While the Commission referred to the Court's decision, it is entirely plain from the Commission's findings that the "prima facie" case which the Court referred to was one which would not be controlling if "countervailing considerations" might be found to exist, and the Commission in its painstaking review of the evidence clearly showed that it considered all relevant facts and that Southern had in fact sustained the burden of proof resting upon it.[6]

The Commission in showing undue circuity of the Georgia R.R. and A. C. L. routes to be eliminated, pointed out the mileages "to the principal destination of the coal traffic affected by the routing restrictions, Warner Robins, Ga., the location of an Air Force base", the distances from Atlanta being only 104 miles over the Southern, 219 miles over the Georgia R.R., and 220 miles over the A. C. L. which involved a "movement of 48.5 miles in the nature of a backhaul". (J. S. App. p. 36). It thus showed that over the Georgia R.R. route beyond Atlanta the haul would be 115 miles longer than over the Southern route, and that the A. C. L. route would be 116 miles longer than over the Southern route, or in both cases the routes would be more than twice as long as the Southern route. The Commission also showed that it was not bound by consideration of circuity under the long-and-short-haul clause of section 4 of the act which had been amended since the Commission's first report (J. S. App. p. 41).

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[6] The question raised by appellants as to the effect of not appealing the lower court's decision is immaterial in view of the *de novo* consideration the Commission gave to the entire record, and insofar as rulings of law might be considered, appellants are in any event bound by their failure to appeal.

The fact as to extra hauls of more than 100 miles each over th two routes to be eliminated within itself evidences wasteful operation.

As showing the wasteful character of the two eliminated routes here involved because of the undue circuity thereof, an experienced operating official of Southern testified that "from a transportation standpoint * * * it would be much more economical to handle them [the coal cars] over the Southern-GS&F route", which "is 104 miles" to Warner Robins, "while the distance * * * is approximately 220 over the Coast Line route". "In that distance to handle the car, you would have that much more maintenance on the car, you would have that much more maintenance on your tracks, you would use more diesel oil, use more diesel power. Your train crew hire on a railroad is based on 8 hours work or 100 miles. In other words 100 miles in freight train service on a railroad is equivalent to a day's work, and, when you go 220 miles as against 104, you are paying for 2.2 days as against 1.04 days on the Southern-GS&F route" (R. 490). This is clearly true also as to the Georgia R.R. route.

This witness also showed that part of the service over the Georgia R.R. is by a *local* train beyond Camak, Ga. to Macon (R. 390) and that there is evidence of interference and delay in the switching to Southern at that point (R. 495). Moreover, appellants fail to mention the fact that traffic moves in heavier trains over the Southern route as compared with the A. C. L. route and the service is thus more economical; also that Southern's route is a favorable one as compared with the Georgia R.R. route which has only local train service over part of that railroad. The Commission points out the facts as to the heavier trains over the

Southern route and the local train service between Camak and Macon of approximately 78 miles over the Georgia R.R. route (J. S. App. p. 40; R. 408, Ex. 65; R. 488, Ex. 66).[7]

In considering whether, as the Commission has found, it is consistent with the public interest to cancel the Georgia R.R. and A. C. L. routes, it is to be noted that the National Transportation Policy (49 U.S.C.—note preceding section 1) is that the Interstate Commerce Act is to be "so administered as * * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation * * *" and that "the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy". (J. S. App. p. 50)

The record shows that Southern has recognized that railroads in the severe competitive conditions confronting them must adapt and readjust their equipment, facilities and services to provide the most economical and efficient operation possible. To this end Southern has spent large sums in modernization and mechanization and has accomplished relatively better and more

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[7] Appellants seek to give the impression of more favorable operating conditions in handling coal over the A. C. L. bridge route to Warner Robins. The evidence clearly shows that there is a back haul in the loaded movement from Cordele to Warner Robins; that even if an A. C. L. car should arrive earlier than a car over the Southern route, there would be no actual saving of time because both cars would go into the plant at the same time (R. 508); and that more car days would be required over the A. C. L. route, because empty cars brought in over the A. C. L. route would have to be sent back over the same route through Cordele as contrasted with the direct movement of empty cars from Warner Robins over the Southern route to Atlanta and beyond to the coal mines (R. 489, 493, 508).

economical and efficient service than the other carriers here involved (R. 57, 58-62, Exs. 23, 24).

This Court pointed out in *New York Central Corp.* v. *United States*, 287 U.S. 12, 25 (1932), an acquisition proceeding under section 5(2) of the act that "* * * the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *." See also *Schwabacher* v. *United States*, 334 U.S. 182, 194 (1948) and *Delaware, L. & W. R. Co. Trackage Rights*, 295 I.C.C. 743, 756 (1958).

The lower court in its decision in 167 F. Supp. at p. 754, referred to the National Transportation Policy as showing the intent of Congress "to have the Commission give serious attention to the matter of providing economical transportation" and referred in this connection to "the subcommittee report which is part of the legislative history of this [1958] amendment to the Interstate Commerce Act" stating that the "railroad industry has not, in the subcommittee's opinion been sufficiently interested in self help in such matters as * * * *abolishing of unnecessarily circuitous routes for freight movements*" (emphasis supplied).

The finding of the Commission of "undue circuity" over the eliminated routes is not only clearly supported by "substantial evidence" which is all that is required (*Universal Camera Corp.* v. *National Labor Rel. Bd.*, 340 U.S. 474, 488) but is supported by the overwhelming weight of the evidence and is in accord with the terms of the Act and the National Transportation Policy. The lower court properly upheld the Commis-

sion's finding as to the "unduly circuitous" character of the eliminated routes (J. S. App. pp. 18, 19).

Finding of "relatively insignificant" movement of traffic over the Georgia R.R. and A. C. L. routes before cancellation thereof. Appellants do not attack directly the finding as to the relatively insignificant traffic moving over the Georgia R.R. and A. C. L. routes before they were cancelled, but indirectly attack this finding in claiming that operations over those routes were profitable and that the elimination of the routes "will result in a diminution of service both on this and other traffic moving via Coast Line and the Georgia Railroad" (J. S. p. 31).

The Commission in its report shows the number of carloads of coal which moved over the Georgia R.R., A. C. L. and Southern routes in 1955, 1958, and in 1959 prior to the cancellation of the first two routes on July 13, 1959. It properly found that these shipments amounted to only about "*3 cars per week*" over each of the two routes to be eliminated. (Emphasis supplied) This is equivalent to an average of less than one-half a car per day. On the other hand the great bulk of the traffic is shown to move over the Southern route (J. S. App. p. 37; see also Ex. 64, R. 43, 455).

There is no showing that since the routes were closed there has been any attempt by any shipper to move any coal over these closed routes.

Appellants seek to show that the operation prior to closing of the Georgia R.R. and A. C. L. routes was profitable. There is no requirement under the statute, that such a showing be made. However, the Commission finds that appellants' claim is not sustained, after comparing the average coal revenue per car mile of

the coal traffic involved with system average operating expense per car mile which shows as to Southern that the revenue exceeds the average operating expense, while the reverse is true as to the Georgia R.R. and A. C. L. (R. 521, 522). Moreover, as the Commission points out, the operating expenses do not include such important items as "payroll and other taxes, equipment and joint-facility rents, and return on investment" (J. S. App. p. 41). While the Commission said that "the data have the deficiencies of system averages", it said the "indicated non-profitability of the traffic to the protestants is not rebutted by better evidence" (id.)[8]

Appellants' attempt to bolster their claim of profitable operation by reference to average per-car revenues (J. S. p. 32) is on an utterly unsound basis because merely revenue comparisons are of no significance in showing costs. Moreover, appellants' contention that cancellation of the routes would "lead to diminution of service" is fatally weak. The contention in the record was that cancellation would cause a reduction of daily service to a tri-weekly service over the Georgia

[8] Certainly in the light of the excess distances involved and the wasteful character of such circuitous routes over the Georgia R.R. and the A.C.L., as compared with the Southern route, the burden shifted to the appellants to offset the cost comparison and they had every opportunity to do so. In *Chesapeake & O. Ry.* v. *United States*, 11 F. Supp. 588, 593 (affirmed 296 U.S. 635), it was held that while the complainant shipper had the burden of showing that the railroad rates attacked were unlawful, the evidence was ample, "especially in view of the fact that if the operating conditions were not equal, the evidence necessary to establish that fact lay peculiarly within the knowledge of the railroad". See also *Eastern Bituminous Coal Assn.* v. *Baltimore & O. R. Co.*, 299 I.C.C. 691, 722, and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1938).

K.R. This is on its face absurd when only an average of less than one-half car a day is involved. The claim also was made that a reduction to tri-weekly service had been made necessary but the record showed that the reduction occurred more than a year prior to the closing of the route and therefore had no relation to the closing (R. 391, 393).

Findings as to shipper testimony. Appellants contend that "shippers and receivers appeared in opposition of these schedules *at each and every hearing* before the Interstate Commerce Commission * * *" (J. S. p. 13; emphasis supplied). This is a distortion of the facts.

The Commission's report shows that only two shipper witnesses appeared at the original hearing, that neither appeared at the further hearing and thus made no attempt to repair the defects in their testimony, that only *one* other shipper witness appeared at the further hearing and his testimony was even weaker than that of the first two witnesses.

The Commission's report shows that it carefully considered and made findings as to the shipper testimony and that the infirmities in such testimony were such as to be no obstacle to finding that the routes in question should be eliminated.[9]

The Commission showed as to the two witnesses at the first hearing that most of the coal traffic had moved over the direct Southern route, that the service had been adequate and satisfactory, that they weakly con-

[9] There is "no real demand" or any "real interest" by shippers for the two circuitous routes here involved. Such lack of interest has been held significant in *Newsprint Paper Via Cheyenne, Wyo. and Denver, Colo.*, 309 I.C.C. 343, 346; *Restrictions in Routing over S. L. & U. R. R.*, 115 I.C.C. 357, 369, and 122 I.C.C. 208, 211.

tended that "they preferred to have all routes kept open * * *", and that they were concerned with emergency conditions as to which the Commission could adequately deal by special orders under section 15(4) of the Act.

As to the only witness testifying at the further hearing, the Commission found that he "expressed a *desire* for continuance of the routes in question, particularly that in connection with the Georgia Railroad". (313 I.C.C. pp. 755-756; J. S. App. p. 39) (Emphasis supplied) This witness, however, expressed interest in only the Georgia R.R. route and falteringly said "I believe there was one car that went that way this year [1959]. I wouldn't want to swear to that, though" (R. 435). He admitted that the coal received by his plant moved over Southern and the C. of Ga. and that no coal was received over the Georgia R.R. in 1957 and 1958 (R. 434). He gave no indication that any coal had ever been received over that route in prior years. The weak representations made by the three shipper witnesses amounted to no more than an indefinite expression of "desire" and formed no substantial basis for disapproving the elimination of the two routes here involved.[10]

[10] The Commission has long recognized that "the mere desire of supporting shippers" for a proposed service under the convenience and necessity provisions of the act is insufficient "to warrant a grant of the requested authority" (*Juan De La Cruz Guerra Common Carrier Application*, 49 M.C.C. 657, 660) and that industries desire the service of as many carriers as possible "regardless of the precepts of Congress embodied in its National Transportation Policy" (*Nashville, C. & St. L. Ry. Construction*, 295 I.C.C. 363, 378, order upheld 156 F. Supp. 711, affirmed 356 U.S. 273, April 14, 1958). Moreover, the effect to be given such testimony was clearly within the Commission's discretion (*United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535, 536 (1946)).

The evidence as a whole, and the Commission's findings, clearly showed that the Commission was fully justified in concluding that the cancellation of the two routes here involved was consistent with the public interest and that the tariff schedules providing for cancellation of these routes, together with the joint rates thereover, are just and reasonable.

2. Cancellation of the Two Through Routes Here Involved Having Been Found Proper, the Question of Rates for Through Service Over These Routes Is Irrelevant

Appellants misconceive and misrepresent the actual fact that the tariffs under consideration provide for cancellation and elimination of the *through routes* via the Georgia R.R. and the A. C. L. bridge lines, and that with no through routes in existence there could not be combination or other rates over routes thus eliminated and making impossible the movement of through traffic thereover.

Appellants seek to rely upon language in the first decision by the lower court in *Southern Railway Company* v. *United States*, 167 F. Supp. 747, 750 (J. S. pp. 20, 33) to support their view that joint rates, not through routes, are cancelled. The quotations, however, are out of context and the Court unmistakably showed that it was concerned with *cancellation* of the two *bridge routes* in stating (p. 754):

> "We think, therefore, that on this affirmative showing the Southern clearly carried the initial burden of proving that the *cancellation of the two bridge routes* (2) [via Georgia R.R.] and (4) [via the A. C. L.] was just and reasonable and consistent with the public interest". (Emphasis supplied)

And the ultimate conclusion of the court (p. 755):

> "We do conclude that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden of showing that the *elimination of routes* (2) and (4) is consistent with the public interest". (Emphasis supplied)

Appellants in their Jurisdictional Statement repeatedly assert their unfounded claim that cancellation of rates, not of routes, is involved. They contend, for example, "that under the factual situation in this case there are still in existence *through routes* via the Coast Line and Georgia Railroad even under the schedules involved since the only change is that unreasonably higher rates would be applied over those routes than over others as a result of Southern's action herein" (J. S. p. 22; for other examples see each of pages 6-15).[11]

The Commission's report here under attack makes the finding previously referred to that "we conclude that the *cancellation of the routes* here in question is consistent with the public interest" (313 I.C.C. p. 758; J. S. App. p. 43; emphasis supplied). Earlier in the report it referred to the fact that from July 13, 1959, the Georgia R.R. and A. C. L. "routes were closed" (313 I.C.C. p. 754; J. S. App. p. 38). It also referred to operation on the Georgia R.R. route "before the closing of its route on coal in July 1959" (313 I.C.C.

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[11] In spite of testimony, as pointed out above, of the Southern witness at the very beginning of this case that the purpose of Southern and the effect of the tariffs, as shown by his exhibits, were to cancel and thus eliminate the through routes including the Georgia R.R. and the A. C. L. (R. 10, 11; Exhs. 3, 4), appellants contend that the Southern witness "stated that the elimination of *joint rates* via the routes in question was a part of an overall program" etc. (J. S. pp. 12, 13; emphasis supplied).

p. 756; J. S. App. p. 40) and stated "The issue here is whether the *cancellation of routes* is consistent with the public interest" (313 I.C.C. p. 758; J. S. App. p. 42; emphasis supplied).

Appellants' contention that through routes are not eliminated via the Georgia R.R. and the A. C. L. bridge lines but that higher combination rates are applicable over those routes is utterly fallacious in view of the fact that the schedules clearly cancelled the *through routes* and did not publish increased rates over those cancelled routes. While in eliminating the through routes the joint rates which previously applied thereover were also eliminated, no rates are applicable over those routes in *through service* from mine to destination. If a shipment moved over one of these cancelled routes, it would have to be as two or more separate local movements pursuant to separate bills of lading and each having separate origin and terminal services, through movement being prohibited. Local rates would be applicable and these rates are already in existence and are not in any sense increased as a result of the cancellation here involved. Moreover, the Commission's order of investigation of July 10, 1952, in docket No. 33128 is into and concerning the lawfulness of the schedules which published the cancellation of routes and the joint rates applicable thereover and named no combination rates.

Appellants' claim that the Commission had the duty to pass upon the reasonableness of combination rates covering separate local movements over non-existent through routes is nothing short of absurd and if accepted, would make a mockery of the provisions of section 15(3) of the act.

In *Thompson* v. *United States*, 343 U.S. 549 (1952), which appellants misconstrue, the Court said:

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering *through* transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service" (p. 557, emphasis supplied).

The Court further said:

"The Commission continues to support its order, but the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available. If there is no *through carriage* over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points *by ordering reduction of the sum of the local rates over that route.* Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order" (p. 559, emphasis supplied).

The through routes in the present case being cancelled, there was no holding out to move through coal traffic, no solicitation of such traffic, and no movement thereof over the lines formerly constituting the through routes.[12]

[12] Witness Martin of Georgia R.R. admitted (R. 249) that "insofar as the shippers are concerned, the tariffs will indicate a complete absence of Georgia Railroad route; and it is certainly unlikely that any shipper or receiver would select a route other than specifically provided in the tariff". See also testimony of L. & N. witness Kuebert who objected to "cutting out these routes" (R. 203).

The question as to reasonableness of through rates, whether by a combination or otherwise, over routes which have been closed is beyond the issues in this case and is irrelevant. The Commission, in referring to the contention made by protestants as to the necessity of considering "higher combination rates" pointed out that "The issue here is whether the cancellation of routes is consistent with the public interest" (313 I.C.C. 758; J. S. App. p. 42). It thus showed that protestants' claim was irrelevant and certainly no further findings were necessary in respect to this immaterial issue.

The Interstate Commerce Act does not require findings as to "collateral or immaterial" contentions (*Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 193, 194) and "does not require the Commission to make detailed findings of fact" but it need only show "the essential basis of its judgment" *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 227, 228 (1951). This the Commission has done in the present case.[18]

The lower court in aptly disposing of the contentions as to rates, said, among other things (J. S. App. p. 20):

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[18] If the Commission could pass upon a combination of local rates applicable only to local traffic between points on a through route, when the through route has in fact been closed as in the present case, it could proceed to reduce the sum of the local rates to the level of the rate over the open routes and thus utterly destroy any attempt under the act to close through routes. This appellants overlook in discussing the *Thompson case*, 343 U.S. 549, and in citing *Cancellation of Routing, Paper, Gainesville M. R. Co.*, 306 I.C.C. 515, 520, and *Southern Ry. Co.* v. *United States*, 153 F. Supp. 57, referred to therein (J. S., p. 19). In the latter two cases the through routes had not been cancelled but were in existence and therefore the question of reasonableness of rates thereover could be dealt with.

"The routes were closed and no question was left as to rates. Southern no longer held itself out as offering through transportation service on coal over these routes." *Thompson* v. *United States*, 1952, 343 U. S. 549, 557. That shipments could continue to move over the same route on local bills of lading at the higher combination rates would not suffice to convert the sum of the routes into through routes."

Appellants' contentions as to rates is repugnant to common sense and completely without merit.

3. The Commission Properly Found That There Was No Unlawful Discrimination Under Section 3(4) of the Interstate Commerce Act

Appellants weakly seek to attack the Commission's finding of no unlawful discrimination. The Commission made plain its reasons for such finding and it is clear that they are reasonable and sound.

The "undue circuity", and therefore wasteful character, of the two cancelled through routes including the Georgia R.R. and the A. C. L. was found by the Commission, while no "undue circuity" was found as to the route including the C. of Ga., which closely approximated the mileage over the direct Southern route and continued to be open with the same joint rates as over the Southern route. The conditions were, therefore, fundamentally different as between the two unduly circuitous and wasteful routes and the nearly direct route including the C. of Ga. The Commission was clearly justified by its findings and the evidence in concluding that the Southern in not opening the two closed routes and providing for rates over those routes on the same level as over the route including the C. of Ga. was not unlawful discrimination under section 3(4)

of the act. To have held otherwise would have amounted to emasculating the provisions of section 15(3) and unmercifully distorting the provisions of section 3(4) of the act.

The Commission said that "Section 3(4) requires equality of treatment between connecting lines, but equality of treatment is determined by similarity of circumstances and conditions", citing cases, but that "the distance from Atlanta to Warner Robins over the Central of Georgia is only about 15 miles longer than over the Southern's direct route, in contrast with 115 and 116 miles longer over the Georgia Railroad and the Coast Line, respectively, a fact which negatives any conclusion that the transportation conditions are similar". As noted, the Commission also found "undue circuity" of the Georgia R.R. and A. C. L. routes (313 I.C.C. p. 758, J. S. App. pp. 42, 43).[14]

---

[14] The lower court in overruling the contention that unlawful discrimination had not been properly found, said (J. S. App., p. 21):

> "Plaintiffs make the novel point that Southern discriminates against the Georgia Railroad by accepting traffic from Central of Georgia at Macon on the basis of through route joint rates in violation of the Section 3(4) of the Act, 49 USCA 3(4). They contend that the point of discrimination is upon delivery in Macon and that to avoid discrimination Southern must perform the same service at the same rate for all cars delivered to Macon by any carrier. To adopt this theory would be to eliminate consideration of the route itself and the factors relating thereto such as circuity and waste from consideration in a route closing case. We are not here concerned with switching or terminal services. Cf. *Louisville & Nashville Railroad Company* v. *United States*, 1915, 238 U.S. 1. Section 3(4) requires equality of treatment between connecting lines but equality of treatment involves comparable conditions and the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia."

The switching cases relied upon by appellants are clearly inapposite and are properly so held by the Court. It is manifest from the Court's decision that the assertion by appellants that it made findings *de novo* to rescue the Commission's orders is unfair and absurd. Also, appellants, in quoting from *Louisville & N. R. Co. Merger*, 295 I.C.C. 457, 486, to the effect that there must be "maintenance of all existing joint routes", failed to quote the language that "conditions are set out in the appendix" and the significant reservation made therein that the requirement as to maintenance of joint routes would apply "unless and until otherwise authorized by us" (p. 506). That case, therefore furnishes no support for appellants' position.

4. There Was No Procedural Error by the Commission in Permitting, By Its Order of March 23, 1959, Southern to Cancel the Two Through Routes in Question Pending Decision on Further Hearing After Its First Report and Order Had Been Set Aside

Appellants make a contention as to an alleged procedural error which is on its face nothing more than an empty legalistic technicality. The claim, in substance, is that the Commission erred by its order of March 23, 1959, in providing for a modification of its order of March 19, 1957, which required cancellation of Southern schedules under suspension in Investigation and Suspension docket No. 6538, the modification being the "vacating and setting aside the requirements that respondents cancel the proposed cancellation of routes embracing the Atlantic Coast Line Railroad Company and the * * * Georgia Railroad * * * pending decision of the Commission on further hearing in this proceeding", and leaving in force the route over the C. of Ga. beyond Atlanta.

Appellants erroneously fail to recognize that in the first court decision (167 F. Supp. 745, 755) the Court said "The order of the Commission is *set aside* and the case is remanded to the Commission for further proceedings in conformity with this opinion" (Emphasis supplied).

Since the order of March 19, 1957, was set aside, with the legal conclusion by the Court that it was invalid as to the through routes including the Georgia R.R. and the A. C. L. bridge lines, it was entirely proper for the Commission to vacate that order insofar as it required cancellation of the tariffs eliminating those routes. The Commission in not suspending the later tariffs providing for cancellation of the two routes mentioned was not governed by the findings in its original decision and expressly provided in its order of March 23, 1959, for further hearing. These later tariffs (Supplement 82 to S.F.T.B. tariff I.C.C. 1499 and Supplement 78 to S.F.T.B. I.C.C. 1427) merely carried forward the provisions cancelling the two routes that were provided in the original tariffs.

If the Commission had not made its decision of March 19, 1957, requiring cancellation of the proposed cancellation of the Georgia R.R. and A. C. L. bridge routes, the tariffs under suspension would have gone into effect under the provisions of section 15(7) of the act prohibiting suspension of a tariff "for a longer period than seven months beyond the time when it [the tariff] would otherwise go into effect". The Court in setting aside the Commission's order left the Commission in the position of not legally requiring the cancellation of the two bridge routes and of properly treating Southern as if such requirement had not been made.

The effect of the Commission's action in entering its order of March 23, 1959, was merely to provide that the *status quo* should be maintained pending final determination by the Commission after further hearing. It acted entirely reasonably and in accord with the statute.

The District Court, in upholding the report and order here under consideration and in rejecting the procedural contention of appellants, appropriately said (J. S. App. p. 20):

> "And on remand it was proper for the Commission to vacate its prior order cancelling the closing of the Coast Line and Georgia Railroad routes by Southern. The status quo did not require continuing the order of cancellation in effect in view of the decision of this court that Southern had established a prima facie case. Plaintiffs tie this action to the denial of their application to the Suspension Board of the Commission to suspend the cancellation and claim prejudice, *but prejudice cannot be based on what was lawful action in every respect.*" (Emphasis supplied)

There was clearly no procedural error.[15]

CONCLUSION

The Commission's order here under attack "carries a presumption of validity" (*Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512 (1944)). There has "been no prejudicial departure from requirements of the law or abuse of the Commission's

[15] The procedural contention as to the order of March 23, 1959, is an exigent and sterile afterthought. Examination of the petition for reconsideration filed by plaintiffs before the Commission fails to indicate that any such claim was made before the Commission and it is, therefore, too late as well as lacking in merit (See *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33).

discretion" (*United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946)). There has been no lack of necessary findings showing "the essential basis of its judgment" (*Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 228 (1951)), and the order is fully supported by "substantial evidence" in the record (*Universal Camera Corp.* v. *National Labor Rel. Bd.*, 340 U. S. 474, 488). Appellants have had a full and fair hearing.

Appellees therefore respectfully submit that the decision of the Court below and the Commission's order which it upholds are clearly correct; that this case presents no substantial question; and that the judgment of the District Court should be affirmed.

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No. 247

In the Supreme Court of the United States

October Term, 1962

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE
COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 247

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S.A. 14)[1] which dismissed

[1] "J.S." and "J.S.A." refer to the Jurisdictional Statement and the separate Appendix to the Jurisdictional Statement, respectively.

appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Atlantic Coast Line Railroad Company ("Coast Line") and Georgia Rail Road & Banking Company ("Georgia Railroad"), appellants, sought to enjoin an order of the Commission which sustained tariffs of the Southern Railway Company ("Southern") and its subsidiary, Georgia Southern and Florida Railway Company ("Georgia Southern"), cancelling certain through routes for coal.

Prior to January 6, 1956, coal originating on rail lines in Kentucky and Tennessee moved on commodity rates to Atlanta, where any one of four carriers, Southern, Central of Georgia Railway Company ("Central"), Coast Line, or Georgia Railroad transported the coal to connections of the Georgia Southern at Macon or Cordele, Georgia. Georgia Southern then delivered the coal shipments to destinations on its line, including the Warner Robins Air Force Base, the primary shipper here involved. Each appellant's participation in this traffic amounted to only approximately 150 carloads per year (J.S.A. 37). Between Atlanta, Georgia, and Warner Robins, the respective distances via the through routes here in issue are as follows (J.S.A. 16, 36):

(1) Via Southern ..... 104 miles
(2) Via appellant Georgia Railroad ..... 219 miles
(3) Via Central ..... 119 miles
(4) Via appellant Coast Line ..... 220 miles[2]

[2] This includes a back haul of 48 miles (J.S.A. 2).

Thus, appellants' through routes were approximately 100 percent more circuitous than the routes via Southern or Central.

By tariffs filed to become effective January 6, 1956, Southern and its subsidiary, Georgia Southern, proposed to eliminate the participation of the Central, Coast Line, and Georgia Railroad through routes on the foregoing movements of coal. The Commission suspended these schedules and entered upon an investigation. In *Routing, Coal. L. & N. R. and N., C. & St. L. Ry. to G.S. & F. Ry.*, 300 I.C.C. 125 (1957), the Commission found that the proposed cancellation of routing was not shown to be just and reasonable and ordered the schedules cancelled (J.S.A. 23). This order was set aside and the case remanded by a three-judge district court in *Southern Railway Company* v. *United States*, 167 F. Supp. 747 (J.S.A. 1). In setting aside the Commission's decision, the court found that the Commission's refusal to permit cancellation of Southern's through routes with Coast Line and Georgia Railroad, the two longest routes, was not supported by the record but that the route of Central was so little longer than Southern's that the court could not overrule the Commission's finding (J.S.A. 11–13). In remanding, the court said (J.S.A. 12–13):

> It is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it. It is possible for the Commission so to shape its report and order as to permit the schedule to stand so far as they eliminate routes Nos. (2) and (4) but not No. (3). We do not even conclude that

> the Commission must do this. We do conclude that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden of showing that the elimination of routes (2) and (4) is consistent with the public interest.

On remand, appellants (but not Central) petitioned the Commission to reopen the record for the receipt of additional evidence (J.S.A. 10–11). By order of March 23, 1959, the Commission reopened the proceeding and vacated its earlier requirement, which had been set aside by the district court, that Southern eliminate its tariff restrictions regarding appellants Coast Line and Georgia Railroad. Insofar as the earlier order affected Central's through route, the order was continued in effect and Southern was not permitted to cancel the route (J.S.A. 45–47). Thereafter, Southern filed tariff schedules again including no through routes with the Coast Line and Georgia Railroad, but maintaining Central's route. After the schedules were filed, appellants requested suspension and investigation in *Routing Coal, L. & N. Mines to G.S. & F. (SRS) Stations,* Docket No. 33128. This proceeding was heard and determined with the reopened proceeding (J.S.A. 34).

On May 19, 1961, the Commission entered a report and order determining that the cancellation of the Coast Line and the Georgia Railroad through routes was consistent with the public interest and just and reasonable, and discontinuing the proceeding. *Routing, Coal, L. & N.R. and N., C. & St. L. Ry. to G.S. & F. Ry.*, 313 I.C.C. 752 (1961) (J.S.A. 34). Appellants' petition for reconsideration was denied

(J.S.A. 49). The district court sustained the Commission, ruling that its decision was in accordance with law and based upon appropriate findings supported by substantial evidence.

ARGUMENT

Appellants' principal contentions are that the Commission's order is not supported by adequate findings and substantial evidence, that the elimination of the through routes with the Georgia Railroad amounts to a discrimination between connecting carriers in violation of Section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)), and that the Commission was required to determine under Section 1(4) and 1(5) of the Act (49 U.S.C. 1(4), 1(5)) the reasonableness of the resulting combination of local rates over the through routes to be cancelled. However, the established facts that appellants' routes are wastefully circuitous, meet no shipper need, and are not profitable on this traffic fully support the Commission's decision and leave no substantial question warranting plenary consideration by this Court.

1. We submit that the district court was clearly correct in holding (J.S.A. 18–19) that appropriate and sufficient findings, based on substantial evidence, support the Commission's conclusion that cancellation of the through routes is consistent with the public interest. As previously noted, appellants' routes are nearly twice the length of the retained routes, resulting in "undue circuity" (J.S.A. 42, 43), and economic waste. Further, there was evidence that this coal traffic is not profitable to appellants (J.S.A. 40–41).

Southern has carried virtually all the coal traffic to destinations other than Warner Robins in recent years (J.S.A. 36–37). The other carriers have shared the traffic to Warner Robins only because of a policy of the Federal Government to distribute traffic among available routes (J.S.A. 37–38). Practically no shipper interest was shown for the continuation of the highly circuitous routes of Coast Line and the Georgia Railroad. No witness from Warner Robins appeared. In the first proceeding, two witnesses representing a coal operators' association and a cement manufacturer appeared, but their testimony was, in the words of the district court in its first decision, "not sufficient to amount to more than the usual wish of shippers to have as many competing lines available to them as possible. The Commission made no finding that the wishes of the two shipper witnesses were warranted by a single fact in the record. It merely stated the shipper's desires" (J.S.A. 11). These two witnesses did not reappear in the second proceeding (J.S.A. 39). The only shipper at the second hearing (a paper manufacturer) expressed "fears that the closing of the route might affect service over the Georgia Railroad in the movement of pulpwood to, and paper products from, the plant at Mead [Georgia]" (J.S.A. 39). But Georgia Railroad had reduced service a full year and a half prior to the closing of the coal route, and the lost coal traffic following the closing of the route amounted to barely three cars a week for this railroad (J.S.A. 40).

2. Appellants contend (J.S. 25–29) that cancellation of the Georgia Railroad route results in a dis-

crimination in violation of Section 3(4) of the Act by Georgia Southern at Macon, Georgia, a common point reached by Southern, Central, and Georgia Railroad, in favor of Southern and Central, and against the Georgia Railroad. The claimed discrimination, however, results entirely because the Georgia Railroad, unlike Southern and Central, is not given a through route. If, as we have shown, the Georgia Railroad was not entitled to a through route, there was no discrimination against it.

A violation of Section 3(4) can occur only if the circumstances and conditions among the lines which reach a common point (here Macon) are substantially similar. The same findings supporting the decision that cancellation of the Georgia Railroad's through route is in the public interest also support the distinction between the through route of the Georgia Railroad and that of the Southern or the Central. As the Commission found, the undue circuity of the Georgia Railroad's route negates any possibility of similar circumstances and conditions as between the Georgia Railroad and the retained routes (J.S.A. 42–43). See also *Routing, Birmingham—Montgomery, Ala., L. & N.R. Co.*, 291 I.C.C. 489, 494 (1954); *Atlantic Coast Line R. Co. v. Southern Ry. Co.*, 304 I.C.C. 655, 665 (1958). To adopt appellants' theory of Section 3(4) would be, in the words of the district court, "to eliminate consideration of the route itself and the factors relating thereto such as circuity and waste from consideration in a route closing case" (J.S.A. 21).

Appellants' reliance upon cases involving switching services is misplaced. This case raises no issue of

the proper charge for the service performed by Southern's subsidiary between Macon and Warner Robins. Rather, the sole issue is whether cancellation of through routes from origins in Kentucky and Tennessee is in the public interest, and this is a matter entirely distinct from the provision of switching services. See *Louisville & Nashville R.R.* v. *United States*, 238 U.S. 1.

3. Appellants contend (J.S. 17–22) that Section 1(4) and 1(5) of the Act require that all rates be "just and reasonable" and that the Commission was required to determine the justness and reasonableness of the resulting higher combination rates once the appellants' through routes had been closed. The determination whether through routes should be permitted, however, does not depend on the level of either the joint rates or the combination rates which would replace them. The reasonability of through routes depends on such factors as shipper requirements, the circuity of the routes, and the need for competition and interchange between carriers (see J.S.A. 7, 10).

"[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." *Thompson* v. *United States*, 343 U.S. 549, 557. Here Southern and its subsidiary stated their intention no longer to hold themselves out as participants with appellants in through routes on the coal traffic involved by publishing tariffs cancelling the through routes and joint rates. We have seen that this decision was properly upheld by the Commission and the district court. The existence of a through rate necessarily presup-

poses the existence of a through route. *Southern Railway Company* v. *United States*, 153 F. Supp. 57, 61 (W.D. N.C.), affirmed 355 U.S. 283. Consequently, the cancellation of the through route leaves no basis for continuance of through rates, and the Commission is not required to make unnecessary findings concerning the reasonableness of through rates over nonexistent through routes. In short, the lawfulness of the rates was in issue only from the outset of the proceeding until, as the district court aptly stated, "The routes were closed and no question was left as to rates" (J.S.A. 20).

4. Appellants also argue (J.S. 22, 24) that the Commission erred in continuing in effect a portion of its order of March 19, 1957, following the decision of the district court setting aside such order (J.S. 22). As noted in the Statement above (p. 3), the district court had sustained the Commission's finding that Southern should not be allowed to cancel Central's through route. At the same time the court set aside the entire decision since Southern had carried its burden of showing that elimination of appellants' routes was consistent with the public interest (J.S.A. 12–13). Although the district court was without jurisdiction to give effect to a part of a suspended schedule, the Commission was not so bound. Consequently, upon remand, the Commission required Southern to maintain Central's through route in effect in accordance with its prior findings respecting Central's route, which had been upheld. At the same time, the Commission reopened the proceeding concerning appellants' routes which gave appellants full opportunity to be heard.

In addition, even assuming that the Commission erred in requiring Southern to maintain Central's route, and that the Commission should have vacated the entire order that had been set aside, appellants are without standing to raise this issue since they were not injured. If all the through routes had been cancelled except Southern's, all the traffic would have gone to Southern; as it was, Central participated in some of the traffic following the closing of appellants' routes. However, appellants have no legal interest in whether Southern gets all the traffic or shares some with Central.[2]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

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AUGUST 1962.

[2] Moreover, appellants failed to raise this question before the Commission and thus have waived the point. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36–38; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155.

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OCTOBER TERM, 1962

No. 247

ATLANTIC COAST LINE RAILROAD COMPANY, *et al*
Appellants

UNITED STATES OF AMERICA, *et al*
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF GEORGIA

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30. United States v. Lowden, (1939), 308 U. S. 225, 84 L.Ed. 208 12

31. United States v. Pierce Auto Freight Lines, (1946), 327 U. S. 515, 90 L.Ed. 821 8

32. United States v. United States Smelting R. and M. Co., (1950), 339 U. S. 186, 198, 199, Rehearing denied (1950), 339 U. S. 972 19

33. Virginian Ry. Co. v. United States (1926), 272 U. S. 658, 666, 667, 71 L.Ed. 463, 468 31

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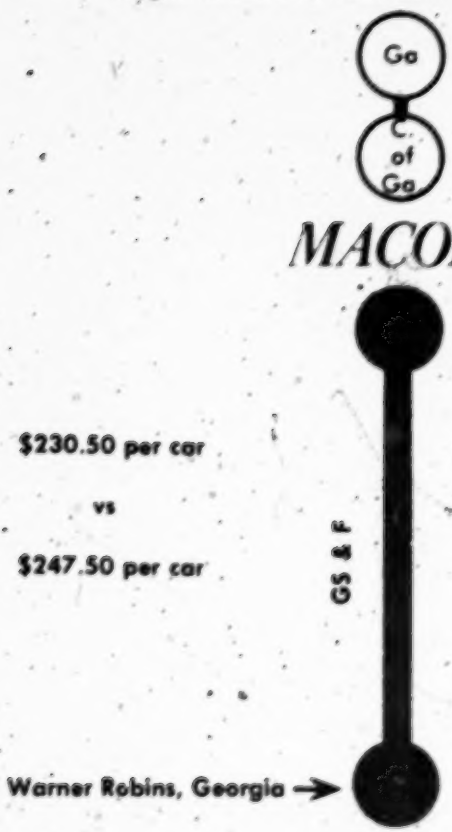
DISCRIMINATION

Chart showing the most glaring example of discrimination (at Macon) on shipments of coal from Windrock, Tenn., a representative origin, to Warner Robins, Ga., a representative destination, but bearing in mind the fact that:

ALL TRAFFIC INVOLVED IN THIS CASE ORIGINATES ON THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND IS TRANSPORTED IN EQUIPMENT OWNED BY LOUISVILLE & NASHVILLE RAILROAD COMPANY, AN APPELLANT HEREIN

Origin: Windrock, Tennessee

Commodity: Bituminous Coal



Cars: Whether traffic moves via Central of Ga. or via Georgia Railroad both cars of coal would be tendered to GS&F by Central of Georgia at Macon.

Thus, the

Service performed by GS&F would be identical whether it handles a car that previously moved via the Central of Georgia or the Georgia Railroad, and the

Distance would be identical from the point where discrimination is charged (Macon) to final destination. Yet, the

Rate from Windrock, Tenn. to Warner Robins, Ga. is 461 cents per ton ($230.50 per car) or 495 cents per ton ($247.50 per car) depending solely upon which of these two connecting lines the traffic moved before reaching the point where discrimination is charged.

Source: Exhibits Nos. 47, 51, 60, 61.

SEE APPENDIX A HEREIN FOR DISTANCES, CIRCUITY AND SERVICE VIA ALL ROUTES IN QUESTION FROM REPRESENTATIVE ORIGIN TO REPRESENTATIVE DESTINATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 247

ATLANTIC COAST LINE RAILROAD COMPANY, *et al*
Appellants

v.

UNITED STATES OF AMERICA, *et al*
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

FOREWORD

Appellants' jurisdictional statement sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case and a statement of the questions presented. It also contains references to the opinions of the District Court, the reports of the Interstate Commerce Commission and the applicable stat-

utory provisions, all of which were reproduced in a separate volume entitled "Appendix to Jurisdictional Statement."[1]

Motions to affirm the most recent judgment of the District Court have been filed by the defendants below, Southern Railway Company and its subsidiary, Georgia, Southern & Florida Railway Company, hereinafter referred to as Southern, the Interstate Commerce Commission and the United States of America, hereinafter referred to as the Government.

It is appellants' position that the questions raised by this appeal are substantial, of general public importance, and stand virtually unchallenged. In fact, both motions to which this brief is in opposition plunge head-on into the merits of the proceedings before the Commission rather than justify the Court action which they seek to have affirmed. Therefore, they never come to grips with the gravamen of this appeal, i.e., the substantiality of the questions presented.

In view of the foregoing, appellants submit that these questions merit full consideration by this Court and that the judgment of the District Court should be reversed.

SUMMARY OF ARGUMENT

In this proceeding, the Commission suspended, conducted a full hearing and condemned tariff provisions published by Southern seeking to eliminate joint rates

[1]/Reference to the page number of the record in the proceeding before the Commission will be preceded by "Tr.", to Appellants' Jurisdictional Statement by "JS", to the Appendix to Appellants' Jurisdictional Statement as "JS App.", and to the record before the Supreme Court by "R", and all will be parenthetically expressed.

via certain through routes which had been applicable for more than a half century. Thus, the initial schedules or requested changes which were published by Southern in the latter part of 1955 to become effective on January 6, 1956, **never became operative.** In fact, they were finally cancelled on October 5, 1957, in a proceeding designated as Investigation and Suspension Docket No. 6538 and as reflected in the Commission's report and order dated March 19, 1957 (JS App. 23).

The District Court, however, vacated and set aside this initial decision by the Commission in **Southern Railway Co. v. United States,** (1958) 167 F Supp. 747 on the grounds that the order Southern complained of did not contain basic findings sufficient to sustain its validity. The Commission vigorously defended its order as did the United States and while the District Court made certain dicta statements concerning portions of the proposed changes nevertheless stated "it is not within our province to give effect to a part of the suspended schedules and to cancel other parts of it." (JS 10, JS App. 12). Thus, the decree set aside the order **in toto** thereby placing the entire proceeding **in fieri** and any appeal at that stage would have been premature to say the least. As to the basis upon which its decision would rest, the Court specifically stated, "Our disposition of the case is based on the nature of the findings and conclusions of the Commission." (167 F Supp. at p. 752).

The Commission, in an attempt to proceed under the remand decree, issued an order on March 23, 1959, that not only reopened Investigation and Suspension Docket No. 6538 but continued in full force and effect a part of its prior order without any attempt to obtain

the necessary relief from the Federal Court that had set it aside. (J.S. app. 46, 47) Since the schedules referred to in the Commission order of March 23, 1959, were no longer in existence, having been effectively cancelled on October 5, 1957, like schedules or requested changes were then published by Southern to become effective on July 13, 1959. However, the Commission ordered that an investigation be instituted into the lawfulness thereof **on July 10, 1959, before such schedules or requested changes became effective** in a proceeding designated as ICC Docket No. 33128. (reproduced herein as Appendix B). Thus, the basic issues were raised at the time the investigation was instituted and pertained to the causal effect of proposed changes on the **factual situation existing at that time, to-wit July 10, 1959.**

No one disputes the fact that **joint** rates applied via the **through** routes in question at that time but the Commission failed to make a finding with respect to the nature of those routes. Certainly, nothing happened thereafter that could possibly have changed either the issues or the nature of those routes and the Commission's use of the term "closed", in referring to such routes in its decisions, was intended to be synonymous with its use of the term "commercially closed." In other words, after the investigation was instituted and the proposed changes became temporarily effective subject to a final determination of the issues theretofore raised, the routes in question became "commercially closed" because the increased rates brought about by such changes were and still are prohibitive (these are the rates designated by an increase symbol in the tariff as reflected in the Commission's order of investigation—see Appendix B herein).

Apparently in the remand proceedings, the Commission was convinced that only a different conclusion would satisfy the Court; particularly so, since no finding was made as to the nature of those routes. The sole distinction that can be drawn between the report approving the schedules on further hearing and the prior report of the Commission condemning like schedules is that dicta statements made by the Court concerning various aspects of the "public interest" issue were erroneously construed to be **the law of the case** as Southern contended they should be treated.

In any event, the Commission failed or refused to prescribe reasonable and non-discriminatory through rates under 49 U.S.C.A.§§ 1 and 3, improperly limited the issues to 49 U.S.C.A.§ 15(3) and concluded by stating "We find that the schedules under investigation are just and reasonable" (J.S. app. 43). The latter does not, however, constitute a finding that the rates are lawful since rates may lie within the zone of reasonableness and yet be unlawful.

In its second review, **Atlantic Coast Line Railroad Co. v. United States,** (1962) 205 F. Supp. 360, the District Court enumerated the findings which it says the Commission made and held that such findings were warranted in law and in fact when tested by 49 U.S.C.A.§ 15(3) and 49 U.S.C.A.§ 15(7). It further held at page 364 that findings with respect to 49 U.S.C.A. § 1(4) and 49 U.S.C.A. § 1(5) were neither made by the Commission nor necessary since "the routes were closed and no question left as to rates." As to the discrimination provisions of 49 U.S.C.A. § 3(4), the Court said, at page 365, "We are not here concerned with switching or terminal services" and

"the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia." Therefore, appellants' plea to have the Commission's order vacated and set aside was denied.

The errors of the District Court which led it to misapprehend and misapply the proper standards for determining whether the order complained of was supported by adequate findings and substantial evidence fall into three general categories, i.e., fact, law and scope of judicial review.

First, as to the facts, the District Court misconstrued the effect of the schedules involved by finding that the routes were "closed" rather than "commercially closed" and finding that this case does not involve rates. Such findings are diabolically opposed to and in irreconcilable conflict with:

(a) the Commission order of July 10, 1959, instituting the investigation,
(b) the rate tariffs designated in that investigatory order which includes as to each "the reference mark bearing an increase symbol," and
(c) the Court's own description of those tariffs in its initial review as to what they purport to do.

In addition, the Court attributed certain findings to the Commission which the latter did not make. For example, the lower court said that the Commission had found that the routes in question resulted in "an unnecessarily higher cost than was the case over the Southern route", whereas the Commission did not make a finding that such routes resulted in a higher cost — much less an unnecessarily higher cost — as to the rates discriminated against than was the case over

either of the preferred routes to which the joint rates sought by appellants now apply. (Other examples are set forth in JS pp. 29-33).

Second, as to the law, the District Court misapplied the "holding out" test which was adopted by this Court in **Thompson** v. **United States** (1952), 343 U.S. 549, 96 L.Ed. 1134, as to the existence of a through route. That test must be applied against the factual situation existing at the time the investigation was instituted and not, as the District Court applied it here, against what the factual situation might be under the proposed changes in litigation. To hold otherwise, would be tantamount to placing the "cart before the horse" or substituting proposed changes in lieu of the facts proposed to be changed thereby rendering investigations or litigation meaningless.

While the voluntary act of the parties may be sufficient to create joint rates and through routes something more is required to eliminate those joint rates and through routes once established. Here, the Court is concluding that the mere voluntary act of one party effectively changes, **ipso facto,** the character or nature of the route in question even though the legality of those changes has been in continuous litigation since the initial publications were suspended by the Commission.

The Court also erred as a matter of law in holding that the discrimination prohibited by 49 U.S.C.A. § 3 (4) is dependent upon whether the case is characterized as a "switching" or "routing" case, citing **Louisville & N. R. Co.** v. **United States,** (1915), 238 U.S. 1, 59 L.Ed. 1177, as authority for such a proposition. Not

only did this Court condemn such an attempt to explain away the mandatory provisions of that statute in the case relied upon by the lower court (JS pp. 27, 28) but this court specifically held that 49 U.S.C.A. § 3(4) "outlaws discrimination in all its forms" in **Dixie Carriers** v. **United States** (1956) 351 U.S. 56, 61, 100 L.Ed. 934.

Third, as to the scope of judicial review, the District Court applied techniques and standards which are completely at variance with those previously established by this Court. While "lip" service was given to the standards sanctioned in **United States** v. **Pierce Auto Freight Lines** (1946), 327 U.S. 515, 90 L.Ed. 821, no attempt was made to actually apply those standards to the case at bar. The most glaring example of such action is the holding by the lower court that it was not prejudicial error and indeed lawful for the Commission to continue in full force and effect a part of its prior order of March 19, 1957, without prior relief from the Federal Court which had set it aside. To permit such a holding to stand would certainly render Federal Court decisions meaningless and appeals thereto an utter waste of time and money.

Another example, is where the District Court made findings **de novo** on various aspects of the "public interest" issue (as to rates, routes and method to determine circuity over the latter) which the Commission itself was either unable or unwilling to make and which was held to be beyond the function of this Court in **U. S. v. Champlin Refining Co.,** (1951) 341 U.S. 290, 301, 95 L.Ed. 950. Certainly if such action is beyond the function of the United States Supreme Court, it is likewise beyond the function of the District Court.

Thus, unless the District Court is to be final and sole judge of its own power to determine the adequacy of agency findings, substantiality of evidence and its own decisions—which it now concludes may be disregarded by the very agency whose action it purports to review—the important questions raised by this appeal warrant the considered judgment of this Court. While there may be a twilight zone between what is permissible in the way of judicial review and what is not, appellants submit that the District Court has so far exceeded the proper scope of judicial review as to remove all doubt that it has in fact misapprehended and failed to apply the standards sanctioned by this Court for determining the adequacy, sufficiency and limitation of agency action encompassed within the statutory powers specifically designed to govern such action.

ARGUMENT

I. THE QUESTIONS PRESENTED BY THIS APPEAL ARE OF GENERAL PUBLIC IMPORTANCE

The answers to the questions presented by this appeal and the subsidiary questions comprehended therein are not only important to the particular litigants involved but are of vital importance to the general public as a means of providing an orderly procedure by which parties appearing before administrative agencies and the courts may be advised of and accorded the fundamental rights of justice and fair play which are implicit in our concept of ordered society.

We are not asking this Court to "weigh" the evidence in the proceedings before the Commission and are not even suggesting that such is necessary to decide the issues in this appeal. We do invite the Court's attention, however, to the fact that shippers or public witnesses have testified in every phase of those proceedings and are here represented by counsel in opposition to the proposed changes but none have ever appeared in support of such changes. In fact, the Commission made a specific finding with respect to shipper evidence in its initial decision condemning the proposed schedules. However, the Court in setting aside the Commission order for lack of sufficient findings was critical of the "weight" that had been given such evidence. Yet, in its second review, the Court apparently felt compelled to conjure up a finding to attribute to the Commission in the absence of an actual finding by the Commission on that issue.

We further submit that the fears expressed by the shippers should not have been so callously disregarded for the case at bar represents but one of many attempts by Southern Railway to effectuate a fantastic and vicious routing program involving the use of unreasonable and often discriminatory practices which have been repeatedly condemned by the Commission and the courts. See **Alabama Great Southern Railroad Co. v. United States,** (1958) 162 F. Supp. 614; **Southern Railway Co. v. United States,** (1957) 154 F. Supp. 562; **Southern Railway Co. v. United States,** (1957) 153 F. Supp. 57; **Southern Railway Company v. United States,** (1958) 166 F. Supp. 78. In the latter case, at page 81, the Court says:

"The only guiding principle underlying this whole-

> sale elimination of the intermediate carriers appears to be Southern's intent to secure its longest possible haul to destinations which it controls. Southern attempts to justify this restrictive routing by saying that the routes over these intermediate carriers involve 'unnecessary and wasteful transportation'. However, where another railroad serves the destination mills, either alone or in conjunction with Southern, Southern will bridge any portion of the traffic it can get, regardless of the length of haul. Apparently, under those circumstances, the interpolation of Southern as the intermediate carrier involves neither unnecessary nor wasteful transportation, or so it seems to Southern."

Here, as in those cases, Southern waited patiently until this and other traffic was sufficiently developed through the cooperative efforts of these railroad appellants and other railroad managements before launching its routing "blitzkreig." This brought about bitter and protracted litigation involving a constant wave of attacks and counterattacks in a multitude of cases. However, the illogical approach used by the District Court here could well sweep aside legal precedents heretofore established by the Commission, other District Courts, and this Court in similar cases. It could also trigger another outburst of routing cases and thereby thwart the competitive efforts of many railroads. Thus, it would only be a question of time before Southern would attempt to commercially close these and other routes for not only coal but other traffic if past experience is any determination of what the future holds.[2]

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[2] Although the Macon Branch is an integral and extremely important segment of the Georgia Railroad's operations, it is a marginal operation and any loss of traffic moving over that segment will severely affect its ability to continue efficient transportation not only on this but on traffic in general (Tr. 268, 299).

Appellants have not at any time, and do not now, deny that the objectives of eliminating wasteful transportation and promoting efficient and economic transportation are praiseworthy when lawfully accomplished. However, the interest of Southern Railway is not necessarily synonymous with the public interest and professed objectives, however praiseworthy they may be, should not be used as a guise to accomplish an unlawful act as Southern attempts to use them here. For example, in its initial review the lower court properly stated that Southern is here:

> "seeking to eliminate a joint rate as existing for all routes except the direct route, No. (1) and thus obtaining for itself the maximum haul without effective competition. . " 167 F. Supp. 747, at page 750.

Similar tariff provisions proposed by Southern were condemned by the Commission in **Cotton From the Southwest to Southern Territory,** (1958) 302 I.C.C. 637, 652, 653, affirmed in **Southern Railway Company v. United States,** (1958) 166 F. Supp. 78, at page 81:

> "The term public interest, as used in the statute, is not a mere general reference to public welfare, but as shown by the context and purposes of the Act, has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. See **United States v. Lowden,** 308 U.S. 225, 84 L.Ed. 208; **State of Texas v. United States,** 292 U.S. 522, 78 L.Ed. 1402; **New York Central Circuities Co. v. United States,** 287 U.S. 12, 77 L.Ed. 138. Stated more specifically, Southern has the burden of showing that the interests, not only of Southern, but of the transportation service in general and

> the shipping public in particular would best be served by closing . . the routes presently available. ."

Thus, Southern's desire to gain additional traffic at the expense of and to the detriment of competing carriers should yield to the public interest; particularly so, where, as here, shippers have opposed but none have supported Southern's proposal to divert such traffic.

Since participation of those competing carriers in this traffic antedated that of Southern's, something more should have been required for Southern to meet its statutory burden of proof to satisfy the public interest issue than a geographical fact which has been in existence since Southern joined those competing carriers in joint rates and through routes, i.e., some routes are longer than others. Nevertheless, this is precisely what the lower court relied upon in its initial opinion to conclude that Southern had established a "prima facie" case. It did this, of course, by measuring the distance from a junction point, rather than primary origin, to final destination. On this theory there would never be any excuse for the maintenance of any route other than the short line distance between any two points or the short tariff route. Consequently, the carrier forming a part of the route having the shortest distance from any common gateway could dictate the closing of all longer competing routes as Southern proposes here. Such an impractical and completely illogical theory has never been used in the history of the Commission.

Perhaps the illogical nature of that theory is the reason why the Commission, apparently assuming

dicta statements of the Court to be the law of the case as Southern had contended, merely quoted the language of the Court rather than make a finding as to whether these routes constitute wasteful transportation.

Perhaps the Commission also remembered when that question was before them in **Coal and Coal Briquettes to the South,** (1953) 289 I.C.C. 341, wherein it had specifically held that these precise routes did not constitute wasteful transportation and were, in fact, desirable in the public interest. The same finding would have prevailed here but for the fact that the Court set aside the Commission's initial findings and concluded that Southern had established a "prima facie" case when measuring routes from a junction point to final destination. While the routes in question are obviously longer than the short tariff route, the fact remains that it does not cost Southern Railway a penny more to haul a Georgia Railroad car of coal from Macon, Georgia, to destination than it does to haul a Central of Georgia car of coal from Macon, Georgia, to destination.

Here, the reasons (delays, extra interchanges and protect long haul) advanced by Southern remained unchanged during the course of the further hearing before the Commission. In fact, Southern seemed content to sit back on its "prima facie" case and take "pot shots" at the affirmative evidence introduced by these appellants rather than attempt to meet its burden of proof under 49 U.S.C.A. § 15(7). As to delays, Southern's own operating witness admitted that the consolidation of Coast Line and L&N yards at Atlanta brought about a substantial improvement in operating

efficiency by the elimination of an interchange which had previously existed when the initial record was made and that Coast Line service would be better than that of Southern by four hours and 40 minutes (Tr. 508, Exhibit No. 60).

The number of interchanges required would be equal as between the Georgia Railroad and the so-called "retained" Central of Georgia route but less via the Coast Line than via the Central of Georgia route. In fact, the same number of interchanges would be required when the route including the Coast Line is compared with the Southern direct route.

Insofar as protection of a carrier's long haul is concerned, such protection is only accorded to the originating carrier (Southern does not originate a pound of this traffic) and then only where a through route is being prescribed by the Commission and not, as here, where a proposal is made to "commercially" close an existing through route by cancellation of the joint rate in connection therewith.

The L&N, an appellant herein, (but erroneously excluded as an appellant in the Government's motion to affirm) originates all of the traffic and owns all of the equipment used in transporting this traffic. Under Southern's routing restrictions the L&N is permitted to deliver traffic to the Southern Railway and Central of Georgia at Atlanta, destined to GS&F stations, but it is not permitted to deliver traffic to the Atlantic Coast Line and Georgia Railroad at the lowest applicable joint rate applying from the involved mine origins to those destinations (Tr. 274, 349, 350). Whereas, in **Louisville & Nashville Railroad Company, Merger, Etc.,** (1957) 295 I.C.C. 457, the Commission stated:

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> "We deem it imperative, however, that our order approving the merger be conditional so as to insure the maintenance of all existing joint routes. ."

The joint routes referred to above included the Coast Line and Georgia Railroad routes here involved. Southern took an active part in that proceeding and insisted on the above-quoted provision being made a condition precedent to the Commission's approval of the merger. Moreover, in view of this condition which was made in the public interest, it seems only logical that if the originating carrier of the traffic here involved could not cancel or commercially close the routes in question, an intermediate carrier should not have been allowed to do so.

Complete statements by the Court showing the grounds upon which its determinations rest are just as necessary as are reports of the Commission setting forth the reasons on which they base their decisions and general or "cryptic" statements to the effect that all the evidence of record was considered neither add to nor subtract from those legal requirements; particularly so where, as here, the grounds upon which such determinations rest touch vitally the public interest.

Certainly the findings made by the Commission on remand are no better than those initially condemned by the lower court and the mere fact that the conclusions have changed in conformity with dicta statements made by the Court does not justify those findings in fact or in law. Therefore, in the absence of a rational basis, not only should the Commission's second decision have been set aside but the opinion of

the Court reviewing it should be reversed for the same reason.

Furthermore, if this Court approves the action of the District Court, it will unduly hamper or impede judicial review and invite all administrative agencies to engage in (and of courts to tacitly approve) the practice of relying upon suspicion, surmise or plainly incredible standards for determining issues presented to them as is the situation here. Such practices have never been condoned by this Court and it should not do so now as the resulting lack of any uniform standard for determining substantiality of evidence would make the administration of agency matters difficult if not impossible.

II

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

A. Judicial review of agency action is limited but not perfunctory and embraces more than mere recitation without application of standards approved by this Court

The Interstate Commerce Commission has no more power than is given to it by statute creating it and setting forth its powers as stated in **Southern Pacific Co. v. Interstate Commerce Commission,** (1911) 219 U.S. 433, 55 L.Ed. 283, and if its action goes beyond such statutory authority or fails to meet the requirements of said statutes, it is invalid and cannot be sustained. Insofar as its quasi judicial functions are concerned,

the Commission must in all stages of proceedings before it adhere to the requirements, the letter and the spirit of the Administrative Procedure Act, 5 U.S.C. § 1000, et seq.

Where a final decision and order is issued by that agency, Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, gives an aggrieved party the right to judicial review thereof, including any preliminary, procedural or intermediate action taken by such agency and "due account shall be taken of the rule of prejudicial error." Thus, the final order must be supported by basic findings contained in the report accompanying it but such findings must in turn be supported by substantial evidence in the record.

In its initial review, the lower court set aside an order of the Interstate Commerce Commission and remanded the case to the Commission for further proceedings. In doing so, however, it specifically stated the basis upon which its decision was made in **Southern Railway** v. **United States**, (1958) 167 F. Supp. 747, 752:

> " . . our disposition of the case is based on the nature of the findings and conclusions of the Commission. . "

Insofar as those findings were concerned, the Court merely held that the Commission had not gone far enough to sustain the validity of the conclusions in its order. In fact, the Court inferred that even those findings, as well as the conclusions reached by the Commission, might be enough as to that part of the publications concerning the Central of Georgia but hastened to add at page 755, "it is not within our province to give effect to a part of the suspended schedule

and to cancel other parts of it."

The Court certainly made no attempt to decide the public interest issue and repeatedly pointed out that "it is the Commission's duty to weigh and adjust conflicting interests." In fact, the Court concluded that the failure of the Commission to make findings of fact which could be considered as offsetting the longer distance via some routes as compared with others:

> ". . make it impossible for us to determine between conflicting interests, which determination it [the Commission] alone may make." 167 F Supp. at p. 755.

It was, of course, not incumbent upon appellants to appeal the initial review by the lower court since nothing was finally decided. The whole proceeding thereafter was **in fieri** and the Commission had a perfect right on reconsideration to make a new record. **Ford Motor Co.** v. **National Labor Relations Board,** 305 U.S. 364 (1939), 83 L.Ed. 221. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. The statute, however, does not require an aggrieved party to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. **United States v. United States Smelting R and M Co.** (1950) 339 U.S. 186, 198, 199, Rehearing denied (1950) 339 U.S. 972.

Contrary to the action taken by the Court in its initial review, the Commission continued in full force and effect the order vacated by the Court without

making any attempt to "so shape its report" which contained the findings upon which that order was bottomed. Instead, on March 23, 195[illegible], the Commission merely modified its prior order or conclusions without changing the findings or reasons which purportedly supported that order. Such action led to an unlawful and completely illogical result as the modification in the order permitted that which the findings in the report would not permit. (Tr. 19-21) Thus, before the ink was hardly dry on the Court's decision, the Commission had done precisely that which the Court had condemned, i.e., issued an order not supported by basic findings essential to its validity. Yet, in its second review, the Court condoned such action on the part of the Commission.

Actually, the lower court attempted to side-step the issue by stating that "it was proper for the Commission to vacate" a part of the order which had already been vacated by a Federal Court and summarily rejected our prejudicial error contention on the grounds that prejudice cannot be based on what was lawful action in every respect." The fact that the Commission vacated a part of something that had already been vacated does not detract one iota from the fact that there is nothing that could justiy it in continuing in full force and effect that which had been vacated by a Federal Court. It necessarily follows that such a modification or ruling could have had, and we contend that it did have, a direct bearing upon whether like schedules, subsequently published by Southern, would be suspended by the Board of Suspension.[3] As a matter of fact, the Suspension Board declined to

[3]/A Board of the Commission employees established for the purpose of handling suspension matters pursuant to 49 U.S.C.A. § 17(2).

con inue the status quo until a valid order could be issued by refusing to suspend the schedules in question and the unlawful order thereby predetermined the issue before such Board in its decision to investigate rather than suspend those schedules in I.C.C. Docket No. 33128.

Despite the clear and unequivocal language of the Court in its initial review that it did not purport to decide the public interest issue, the Examiner who heard the evidence on further hearing under the remand decree merely cited the contentions of the parties and concluded on sheet 8 of his recommended report (R 395, document No. 10):

> "... the evidence on further hearing fails to offset the **holding** of the court that the proposed elimination of routes is consistent with the **public interest and is fully justified.**" (emphasis supplied)

The recommended report was affirmed by a Division of the Commission and petition for reconsideration thereof was denied. In its second review, the Court not only failed to rule whether this did in fact constitute prejudicial error but did say that the initial court order "remanded the case to the Commission with the **observation** that Southern had carried the initial burden of proving that the cancellation of routes (2) and (4) were just and reasonable and **consistent with the public interest** in view of the extent of circuity involved considered in the light of resulting **economic loss.**" **Atlantic Coast Line Railroad Co.** v. **United States,** (1962) 205 F. Supp. 360, 363.

An "observation" is quite different from a "holding".

as the Examiner found it to be and no basis is shown for the "economic loss" to which the court refers.

Whether the District Court did in fact draw conclusions and make rulings on the public interest issue which (by the very terms of its initial review it did not intend to do but which) the Commission construed to be the law of the case presents a substantial question for determination by this Court; particularly so, since the lower court now refers to such purported "holdings" as "observations" but nevertheless condones the action taken by the Commission. In either event, prejudicial error has been established.

It is true that the lower court recited certain standards approved by this court as to the scope of judicial review, but mere recitation without application of those standards is not sufficient compliance therewith and constitutes a denial of due process.

Ordinarily, due process of law is thought of as simply the methods of procedure which were at common law usually applied in connection with the accusation and trial of supposed offenders. Today, due process of law means reasonable law and reasonable procedure or a conspicuous adherence to common sense. It is upon this premise that we predicate our contention that appellants were denied due process of law in violation of the Fifth Amendment of the Constitution of the United States.

It would seem elementary that regardless of whether the order of the Commission or the reviewing court is in form within the delegated power, it must be treated as not embraced therein, where, as here, the exertion of authority has been manifested in such an

unreasonable manner as to cause it, in truth, to be within the fundamental rule that substance, and not the shadow, determines the validity of the exercise of that power. See **Interstate Commerce Commission v. Illinois Central Railroad Company**, (1910) 215 U. S. 452. 54 L.Ed. 280.

Certainly no exhaustive explanation of the merits of the case is necessary to answer the questions presented by this appeal where errors of fact and law appear on the face of the opinion itself. In fact, the Commission report which it purported to review is subject to the same infirmities which moved the Court to set aside the first order of the Commission, i.e., lack of basic findings sufficient to sustain the validity of an administrative order.

In the final analysis, whether the District Court did exceed the proper scope of judicial review in the matters which will be discussed in the remaining sections of this brief certainly raises substantial legal questions on which this Court should pass, involving as they do sections of the Interstate Commerce Act under which there is a considerable amount of litigation.

B. The District Court Erred, As A Matter Of Law, In Qualifying And Failing To Apply The Mandatory And Unqualified Provisions Of The Statute Prohibiting Discrimination.

In a feeble effort to explain away the unqualified and mandatory provisions of 49 U.S.C.A. § 3(4) prohibiting discrimination between connecting carriers, the District Court says that statute, "involves comparable conditions and the route of the Georgia

being closed does not compare with that of Southern or the Central of Georgia" and "we are not here concerned with switching or terminal services." Such statements are certainly not sufficient in law or in fact to qualify the mandatory provisions of that statute which this court has held "outlaws discrimination in all its forms". **Dixie Carriers v. United States,** (1956), 351 U.S. 56, 61, 100 L.Ed. 394.

Insofar as comparable conditions are concerned, the chart at the beginning of this brief clearly shows that the services performed by the GS&F are the same at Macon whether a Central of Georgia or Georgia Railroad car is tendered under joint rates and through route arrangements which have been in effect for more than a half century. Moreover, the distance traversed in performing the service for the railroad discriminated against is also identical with the service performed for the preferred railroads. In addition, there is absolutely nothing in the record to show that the expense is even a penny more for performing that service in connection with the former than in connection with the latter.

The difficulty encountered by the lower court is that it not only misconstrues the position of appellants but fails to take into account the factual situation in this case. Appellants do not contend, as the District Court otherwise infers, that Southern or any other railroad must enter into joint rates and through routes with all carriers reaching a given point. We do, however, contend that if it does enter into such arrangements with several railroads it must not thereafter discriminate in its charges for like or similar transportation services performed for those connecting carriers at that point.

In fact, the reasoning of the District Court on the discrimination issue is in irreconcilable conflict with its reasoning on the circuity aspect of the public interest issue. In one breath the Court says it is fruitless to consider the route itself as consideration must be confined to a segment thereof in any determination of the public interest issue. In the same breath, however, the Court says consideration cannot be confined to what happens at a particular point or over a given segment to determine whether discrimination is practiced, for to do so would be "to eliminate consideration of the route itself." This cannot be ascribed to an unfortunate choice of language but rather it clearly indicates the application of an erroneous standard of judicial review for in the first instance the Court attempts to limit the factors to be considered by the Commission in its determination of the public interest issue and in the latter instance attempts to rewrite the law or place a strained interpretation upon the statute prohibiting discrimination.

The method by which circuity of routes is measured to determine wasteful transportation, as used by the Court in its initial review, certainly did not constitute the law of the case as the Commission construed it to be and the entire route should have been taken into consideration rather than a segment thereof insofar as the public interest issue was concerned. Conversely, only the services performed by the carrier charged with discrimination at the point where such discrimination is charged should be considered in determining whether there is a violation of Section 3(4). What other carriers do, not so charged, is completely irrelevant to the discrimination issue as is the transportation service performed by those carriers prior

to the time that the traffic reaches the point where discrimination is charged. Thus, only a comparison of the services performed by the GS&F for its connecting carriers is relevant as to whether it discriminates against one or more of those connecting carriers in its rates or charges for like or similar services. To hold otherwise, as the lower court did here, would be to ignore the unqualified provisions of the statute.

In addition to Macon, discrimination also occurs at Cordele, Georgia, since GS&F will accept Southern and Central of Georgia cars at Macon but will not accept cars loaded with coal from Coast Line at Cordele at the lowest competitive rate. Thus, as to the Atlantic Coast Line route, it is significant to note that both the Commission and the courts have held that the discrimination prohibited under Section 3(4) is not confined to situations involving interchanges at the same point. For example, in **Alabama, Tennessee and Northern R. Co.** v. **Southern Railway,** (1928) 148 I.C.C. 708, the Commission held that failure or refusal of defendant Southern Railway System to enter into joint rates with complainant on interstate traffic moving over complainant's lines between Mobile, Alabama, and all points on defendant's lines maintaining joint rates on like traffic in connection with the Mobile and Ohio and Gulf, Mobile and Northern Railroad via Meridian, Mississippi, and the Louisville and Nashville Railroad via Birmingham was a violation of that statute. See also **Routing via Quanah, A&P. Ry Co.,** (1935) 211 I.C.C. 443, 220 I.C.C. 137, sustained in **Thompson** v. **United States,** (1937), 20 F. Supp. 827; **Cancellation of Rates and Routes via Short Lines,** (1959) 245 I.C.C. 183; **Quanah, A.&P. Ry. Co.** v. **Atchison, T & S.F. Ry. Co.,** (1938) 226 I.C.C. 201.

Here, a higher rate will be assessed if the traffic has previously moved over one connecting carrier but a lower rate will be applied if the same traffic has moved over another connecting line. Yet, as stated in **Pennsylvania Co.** v. **United States** (1914) 214 F. 445, 449, if a reasonable compensation is fixed for the service **the carrier may not inquire into the route over which it has been moved** to reach its rails merely to decide whether or not it will transport the car so offered. That decision was affirmed by this Court in **Pennsylvania Co.** v. **United States,** (1915) 236 U.S. 351.

The District Court also attempted to qualify the discrimination prohibited by Section 3(4) on the basis of the services involved and concluding that the statute was not applicable since this is a "routing" and not a "switching" case, citing **Louisville & N. R. Co.** v. **United States,** (1915) 238 U.S. 1, as authority for such a proposition. However, the appellants in that case attempted to do precisely what the lower court concluded here by insisting that **Pennsylvania Co. v. United States, supra,** did not involve **switching** but **transportation.** Such an attempt to explain away the mandatory provisions of the statute was condemned by the Supreme Court in the **Louisville & N. R. Co. case, supra,** at page 20:

> ". . . but the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing."

Since other traffic is being interchanged between the Georgia Railroad and the GS&F at Macon, it is rank

discrimination to single out this coal traffic and say that higher rates should be assessed when a car is received from the Georgia Railroad than when received from the Central of Georgia or Southern. Considering such a situation in the **Louisville & N. R. Co.** case, **supra,** this Court stated at page 19:

> "In substance, that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others."

Oddly enough, appellees point to the "relatively insignificant movement" but as this Court stated in **Chicago, I. and L. R. Co. v. United States,** (1926) 270 U.S. 287, 293, 294, 70 L.Ed 590, 594, the relatively small number of cars does not constitute differentiating circumstances which negative discrimination under Section 3(4) of the act. Surely if the traffic is substantial enough for Southern to make an effort to divert appellants' share thereof to itself, it seems only logical to conclude that it would be even more valuable to the smaller intermediate carriers thereby justifying an effort on their part to retain their own traffic which the proposals in question are designed to divert to Southern.

The opinion of the District Court stands alone in holding that Section 3(4) is not applicable in "routing" cases. Such a holding cannot find support in statutory or case law and is contrary to established legal precedents, including the holding of this Court that the involved statute "outlaws discrimination in all its forms." Even if the Commission had based its finding on transportation matters rather than the purported "holding" of the Court, discrimination that is

flatly forbidden by statute could not be sheltered under the shield of expertise.

Thus, whether, as this Court has ruled, the statute is clear and unequivocal in its terms or whether such terms are so ambiguous as to require an interpretation thereof, as the District Court has done here, presents a substantial question concerning the meaning and applicability of 49 U.S.C.A. §3(4) which should be resolved by this Court.

C. The District Court Misapprehended And Grossly Misapplied The Holding Out Test Approved By This Court In Thompson v. United States, (1952) 343 U.S. 549, 96 L.Ed. 1134.

The real difficulty as to the existence or non-existence of through routes in this case springs from the failure on the part of the Commission to make a finding with respect thereto. Even though appellants urged the lower court to rule that it was error for the Commission to have failed to do so, this plea was ignored as the District Court made a finding **de novo** which the Commission was unable or unwilling to make, i.e., the routes in question do not constitute through routes.

The District Court cited the "holding out test" approved by this Court in **Thompson** v. **United States, supra,** to support its finding that no through routes, including Atlantic Coast Line and the Georgia Railroad, exist. However, both the test and the case cited not only fail to support the finding made by the lower court but could only support a finding exactly opposite to that made by the District Court in this case. For example, there was no evidence in the **Thompson** case

that any shipment had ever moved over the route in question whereas in this case there have been movements over the routes in question for more than a half century. Although there were joint rates and through routes from the origin in question to points **short** of the destination sought in the **Thompson** case, there had never been joint rates and through routes from the origin (Lenora) to the destination involved (Omaha). On the other hand, no one even questions the fact that joint rates and through routes have been in effect from all origins to all destinations in this case for more than a half century and were in effect at the time the investigations were instituted by the Commission in this case. With these distinctions in the factual situation as between the two cases in mind, we turn now to the test unanimously agreed upon by this Court in the **Thompson** case at page 557:

> "In short, the test of the existence of a through route is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged or the through service."

The terms of the test are clear enough but the difficulty encountered by the lower court was in applying it against what the facts would be under the proposals in question rather than against the facts as they existed when the investigations were instituted by the Commission.

In any proceeding before an administrative agency or indeed in any case before a court of law, it is incumbent upon the agency or court to make certain basic findings of fact which existed **at the time** the in-

vestigation was initially instituted or **at the time** the cause of action arose. Proposed changes in the factual situation found to exist **at the time litigation begins** merely give rise to certain basic issues that must be determined on the basis of whether the causal effect which such requested changes are designed to bring about will be just, reasonable or otherwise unlawful. Certainly, neither subsequent acts by the parties nor decisions, rulings or opinions which are interlocutory in nature can change either the basic issues or the facts upon which they must be predicated.

Regardless of whether the effect of Southern's proposals was intended to cancel the rates thereby commercially closing the routes or whether its effect was intended to cancel the routes, there can be no question but that at the time both investigations were instituted the routes in issue were "through" routes and joint rates applied in connection therewith. Thus, it was incumbent upon the Commission to make a finding that the routes in question constituted "through" routes for the purpose of deciding the issues theretofore raised regardless of what transpired **after** litigation began. Here, the Commission failed to do so and the District Court erroneously made a finding **de novo** contrary not only to the evidence of record but the very test upon which it relies.

The combination rate that became applicable by virtue of Southern's action herein was so high that it "commercially" closed the routes on coal. However, as this Court stated in **Virginia Ry. Co.** v. **United States,** (1926) 272 U.S. 658, 666, 667, 71 L.Ed. 463, 468, the fact that a route is so closed does not bar the Commission from prescribing reasonable and non-discriminatory

through rates under Section 1 and 3 of the act, without proceeding under Section 15(3). Moreover, since other traffic is moving over the through Coast Line and Georgia Railroad routes at joint rates in connection with the GS&F today, it was sheer folly for the Court to hold that such routes were "closed."

Appellants submit that the District Court erred in making a finding as to the existence or non-existence of through routes in the absence of such a finding by the Commission and in approving an administrative order without such a basic finding. **A Fortiori,** we submit that this Court should determine whether the District Court misapplied the holding out test which was unanimously approved in the **Thompson** case in order to avoid the establishment of an illogical and dangerous precedent.

D. The District Court's Action In Limiting The Issues Was Not The Product Of Reason And Judgment But Was, In Fact, Arbitrary And Capricious

The finding which the District Court made with respect to the nature of the routes referred to in the preceding section of this brief was apparently to support another finding **de novo** which the Commission was unable or unwilling to make, i. e., since the routes were closed "no question was left as to the rates." Such a finding, however, is in irreconcilable conflict not only with the Commission order instituting the investigation under review but with the very terms of the statute by which the Court itself says the administrative decision is to be tested, i. e., Section 15(3) and 15(7)

of the Interstate Commerce Act, 49 U.S.C.A. § 15(3) and § 15(7).

In contrast with that finding the court had described the scope and effect of the schedules involved as follows:

> "**Seeking to eliminate the joint rate** as existing for all routes except the direct route, (1) and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission **schedules proposing to eliminate the joint rates . . .**" 167 F. Supp. 747, at page 750.

Moreover, no one questions the fact that joint rates and through routes applied via the Atlantic Coast Line and Georgia Railroad at the time the Commission instituted the investigation in this proceeding on July 10, 1959. In fact, the order instituting this investigation specifically referred to the **rate tariffs involved** including as to each "the reference marks bearing an **increase symbol.**" That order is reproduced herein for the convenience of the Court as Appendix B. Obviously, the only possible significance that such an increase symbol could have is with respect to the rate to be applied over the route that is cancelled **only insofar as the applicability of joint rates is concerned.** This fact is clearly shown in Exhibits 47, 51, 60 and 61 where the rate to be applied via the route including the Georgia Railroad, as shown in the "Discrimination" illustration at the beginning of this brief, is 495 cents per ton. This rate, as reflected in the exhibits referred to in that chart, was taken from the specific rate tariff here involved which was filed with the lower court in a rather ignominious fashion. (JS page 20, footnote 6).

Despite these uncontroverted facts, the District Court in its second review held that "no question was left as to rates" thereby sweeping aside the issues pertaining to Sections 1(4) and 1(5) of the act. That conception of the scope and function of the investigation proceeding by the Commission in I.C.C. Docket No. 33128 (erroneously referred to by the Court in its opinion as a suspension docket) is not only inimical to the very order initiating the proceeding but is contrary to the terms of 49 U.S.C.A.§ 15(7) by virtue of which said investigation order was issued. In fact, both the investigation order and that statute, by their very terms, concern themselves with the lawfulness of rules, regulations and practices affecting rates as well as rates themselves which must conform to all provisions of the Interstate Commerce Act which set forth standards of lawfulness, including Sections 1 and 3. Commenting on Section 15(7) of that statute, the Court stated in **Long Island Rail Road Company v. United States,** (1961), 193 F. Supp. 795, at page 800:

> ". . . It can hardly be doubted that limiting the effectiveness of a rate to one of a number of routes is a 'regulation or practice affecting any rate.' "

Thus, the higher combination rates that became temporarily applicable pending a final determination of the issues herein, constituted a part of Southern Railway's burden of proof and such issues should not have been summarily rejected as both the Commission and the lower court did here. As to those determinations, both the Commission and the courts have held as stated in **Cancellation of Routing, Paper, Gainesville M. R. Co.,** (1959), 306 I.C.C. 515, 520:

> "An appropriate standard with which to measure the justness and reasonableness of the rates over the Gainesville Midland routes (here Coast Line and Georgia Railroad routes) is the level of comparable rates from and to the same points over the competitive routes (here Southern and Central of Georgia routes). See **Carolina, C&O Ry. Co.** v. **Southern Railway Co.**, 299 I.C.C. 335; sustained **Southern Ry. Co.** v. **United States**, 153 F. Supp. 57." (Parenthetical expression supplied)

In addition, this Court specifically stated in **U. S.** v. **Champlin Refining Co.**, (1951) 341 U. S. 290, 301, 95 L.Ed. 950 that it was beyond its function "to rescue the Commission by making findings **de novo** which the Commission itself was unable or unwilling to make." Certainly if such action is beyond the function of the United States Supreme Court, it is likewise beyond the function of the District Court to make such basic findings which the Commission should have made in the first instance and which are necessary to sustain the validity of its orders.

CONCLUSION

The findings which the District Court apparently felt compelled to make so as to sustain the Commission's order, in the absence of such findings by the latter, emphasize not only the basic weakness in the Commission's report but disregard the primary purpose of court review, i.e., to examine what the agency has done and the basis for it—not to conjure up findings to support it. In addition, the opinion of the lower court is based on not only errors of law but on assump-

tions which are not sustainable in the record and neither of the motions to affirm has shown otherwise.

The District Court's mere recitation without application of standards approved by this Court constitutes a philosophy completely foreign to our jurisprudence and if permitted to go uncorrected will virtually make a mockery of judicial review. Therefore, appellants submit that the questions presented by this appeal are substantial, are of general public importance and merit full consideration by this Court. The judgment of the District Court should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Albert B. Russ, Jr., one of the attorneys for appellants and intervening appellants herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of September, 1962, I served copies of the foregoing brief of appellants in opposition to motions to affirm, on the several parties of record, as follows:

(1) On the United States, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C., and to Floyd M. Buford, Esquire, United States Attorney for the Middle District of Georgia, U.S. Post Office Building, Macon, Georgia.

(2) On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Messrs. Leonard S. Goodman and Robert W. Ginnane, its Counsel, to the office of the Commission, Washington 25, D. C., and,

(3) On Southern Railway and Georgia, Southern and Florida Railway, intervening defendants before the Court below, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective Attorneys of Record, i.e., (1) Mr. R. Granville Curry, 631 Southern Building, Washington 5, D. C.; (2) Mr. Henry J. Karison, Southern Railway Building, Washing 13, D. C., and (3) Mr. Charles J. Bloch, 520 First National Bank Building, Macon, Georgia.

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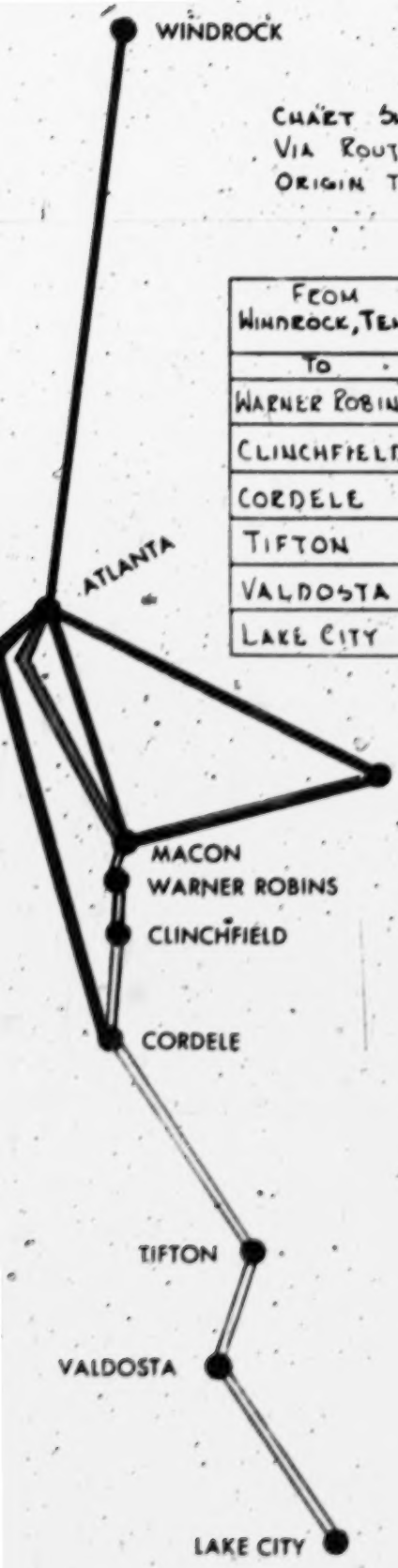
CHART SHOWING DISTANCE, CIRCUITY AND SERVICE, VIA ROUTES INDICATED FROM REPRESENTATIVE ORIGIN TO REPRESENTATIVE DESTINATIONS.

FROM WINDROCK, TENN.	L&N ATLANTA SOU. RY. MACON G S&F		L&N ATLANTA ACL CORDELE G S&F		L&N ATLANTA CofGa. MACON G S&F		L&N ATLANTA GA. RR MACON G S&F	
TO	MILES		MILES	CIR.	MILES	CIR.	MILES	CIR.
WARNER ROBINS	343		453	32.1	352	2.60	452	31.78
CLINCHFIELD	358		438	22.3	367	2.50	467	30.45
CORDELE	391		404	3.32	400	2.30	500	27.88
TIFTON	432		445	3.01	441	2.08	541	25.33
VALDOSTA	478		491	2.72	488	2.09	587	22.80
LAKE CITY	539		552	2.41	548	1.67	648	20.22



SOURCE: SHEET 5 OF DIVISION 2'S REPORT AND EXHIBIT No. 11.

SERVICE- WINDROCK, TENN. TO WARNER ROBINS, GA.		
VIA	INTERCHANGE	TIME IN TRANSIT
L&N SOU G S&F	1	58 HRS 39 MIN
L&N GA. G S&F	2	55 HRS 04 MIN
L&N ACL G S&F	1	50 HRS 14 MIN
L&N CofGA G S&F	2	55 HRS 04 MIN

LEGEND

- LOUISVILLE & NASHVILLE
- GEORGIA RAILROAD
- ATLANTIC COAST LINE
- CENTRAL OF GEORGIA
- GEORGIA SOUTHERN & FLORIDA
- SOUTHERN RAILROAD

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION Division 2, held at its office in Washington, D. C., on the 10th day of July, A.D. 1959.

No. 33128

ROUTING — COAL —

L&N MINES TO GS&F(SRS) STATIONS

There being under consideration the matter of rules, regulations and practices affecting rates and charges applicable on coal, in carloads, from Louisville and Nashville Railroad Company mines in Kentucky, Tennessee and Virginia to Georgia, Southern and Florida Railroad Company (Southern Railway System) stations in Georgia and Florida, as set forth in the following:

Southern Freight Association, Agent:

I.C.C. 1427 (Spaninger series);

In SUPPLEMENT 78, on page 3, in Items 9188-C through 9330-C, the reference mark bearing an increase symbol, and the explanation thereof

In SUPPLEMENT 80, on page 3, all matter which is a reissue of, or is the same as, that suspended in SUPPLEMENT 79

I.C.C. 1499 (Spaninger series);

In SUPPLEMENT 82, on page 4, in Items 25840-C through 25506-C, the reference mark bearing an increase symbol, and the explanation thereof

also, in

I.C.C. S-62, all matter which is a reissue of, or is the same as, that suspended above in I.C.C. 1427 and 1499

or as the same may be amended or reissued;

It appearing, That, upon consideration of the said tariff schedules, and protest thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules, regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to said schedules be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that notice of this proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2.

HAROLD D. McCOY
Secretary

(SEAL)

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